

**REPORTS**  
 OF  
 CASES ARGUED AND DETERMINED  
 IN  
**THE SUPREME COURT**  
 OF  
**THE STATE OF LOUISIANA.**

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**EASTERN DISTRICT.**  
**NEW-ORLEANS, JANUARY TERM, 1841.**

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**FLEMING ET AL. vs. HILL.**

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

The notary must state facts and show what he has done to find out *the residence* of an endorser, and give notice of protest; and not merely to assert in general terms that he *made diligent enquiry*, and was unable to ascertain it.

So when the notary's clerk testified that "he made diligent enquiry and endeavored to find out the residence of the endorser," but in vain, it was held to be insufficient. The particular facts must be shown to enable the court to determine if *proper diligence* has been used.

**EASTERN DIS.**  
**January, 1841.**  


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**FLEMING ET AL.**  
**vs.**  
**HILL.**

This is an action against the endorser of three checks or drafts drawn at Vicksburg in Mississippi, on the Cashier of the Girard Bank in Philadelphia, and "acceptance waived." They were endorsed by the payee and the present defendant; and protested at maturity for non-payment. The usual allegation is made of protest and due notice thereof given to the endorser.

EASTERN DIS.  
January, 1841.

FLEMING ET AL.  
VS.  
HILL.

The defendant pleaded a general denial; and averred that he was not liable as endorser for want of legal and due notice.

Upon these pleadings and issues the case was tried.

It appeared in evidence that Hill, at the time these checks were drawn, in 1838, was a resident of Nashville, but had advertised his intention to remove his residence to New-Orleans, where in fact he has almost ever since resided and carried on business as a partner in a commercial firm. He never resided at Vicksburg. The drafts or checks matured and were protested in Philadelphia. The notary and his clerk both state in substance that they made diligent enquiry to find out the residence of the defendant, but could get no information about it. He then sent the notices to Vicksburg, addressed to the drawers of the checks. There is no evidence that the defendant had any notice of protest. It was shown that he was a conspicuous dealer in exchange and in merchandise in Philadelphia, and generally known to the mercantile community there; and that information might easily have been obtained, of the place of his residence.

There was judgment for the defendant and the plaintiffs appealed.

*C. M. Jones* for the plaintiffs and appellants insisted that the evidence of the notary and his clerk showed that due diligence was used to find-out the residence of the defendant but in vain. This was all the law required. It was impossible to address notice to him at his residence, and the law does not exact impossibilities; the endorser was therefore to be considered as bound absolutely, and must remain bound without notice. The judgment should therefore be reversed and one given for the plaintiffs.

The notary must state facts and show what he has done to find out the residence of an endorser, give notice of protest; and not merely to assert in general terms that he made diligent inquiry, and was unable to ascertain it.

*L. Peirce* for the defendant, said there was no regular proof or evidence of the signatures of the drawer, or of the first endorser of the checks or drafts, and no recovery could be had without proof of these; and the plaintiffs were not therefore shown to be the legal owners of the drafts.



2. The defendant, as appears from the record had no notice whatever of the dishonor of the drafts, although a conspicuous merchant and well and generally known where the drafts were protested.

EASTERN DIS.  
January, 1841.  
FLEMING, M'INTIRE & CO.  
vs.  
HILL.

3. The evidence shows that the notary's clerk did not use any diligence or he might easily have ascertained the defendant's residence from the merchants and others of Philadelphia. The judgment should therefore be affirmed.

*Martin J.* delivered the opinion of the court.

This is an action against the defendant as endorser of three drafts or checks drawn by the cashier of the Commercial and Rail Road Bank of Vicksburg, the 18th May, 1838, payable to the order of Charles Remington, the 1st May, 1839, and addressed to the cashier of the Girard Bank of Philadelphia; "acceptance waived." They were endorsed by the payee and the present defendant, and protested on the 4th May, 1839, at maturity, for non-payment.

The defendant pleaded the general issue and specially denied that he was liable to pay said drafts for want of legal notice. There was judgment for the defendant, and the plaintiffs appealed.

The sole question which this case presents relates to the regularity of notice given to the endorser of several drafts, of their dishonor. The notices were sent in a letter addressed to him at Vicksburg, the place at which the drafts were drawn. It does not appear that he ever resided there. The testimony shows that he formerly resided in Nashville, Tennessee, but that in May, 1838, he gave public notice of his intention to remove his residence to New-Orleans; and that *he has been in New-Orleans for the last two years*. The notary's clerk testifies that, he "made enquiry as to the place of residence of the defendant but was unable to obtain any information about it, although he made diligent enquiries and endeavored

**EASTERN DIS.**  
**January, 1841.**

**ROBERT F. W. C.**  
**vs.**  
**ALLIER'S AGENT**

So when the Notary's Clerk testified that "he made diligent inquiry and endeavored to find out the residence of the endorser," but in vain, it was held to be insufficient. The particular facts must be shown to enable the court to determine if proper diligence has been used.

to find-out his residence." The defendant has introduced several witnesses who depose that he is well known in the city of Philadelphia where he has considerable dealings with several large houses; that he deals largely in exchange, and they believe that on application to any of the Banks of that city, the place of his residence might have been easily ascertained.

The Judge who tried this case, was of opinion that sufficient diligence does not appear to have been used; that it does not suffice to assert it in general terms; and that some particular facts must be shown to enable the court to decide, whether there has been proper diligence; otherwise the case must be decided on the mere opinion of the witnesses. It does not appear to us that the Judge of the Commercial Court erred.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be affirmed with costs.

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**ROBERT f. w. c. vs. ALLIER'S Agent.**

**APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.**

The admission of a Will to probate and the order given for its execution are only preliminary proceedings necessary for the administration of the estate, and do not amount to a judgment binding on those who are not parties to them.

Courts of general jurisdiction cannot sustain an action to establish a Will and decree its execution and the recovery of the property claimed under it.

Whenever the validity of a Will is attacked and put at issue, at the time that its execution is applied for, or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into the possession of the estate under it, *courts of probate alone have jurisdiction.*

In an action by an heir at law, against the testamentary heir or universal legatee, who is in possession and sets up the Will as his title to the property, the district courts, or courts of general jurisdictions are the proper tribunals in which such suits must be brought.

In France, proof of the execution or signature to an olographic will is not required to make it executory. In this state it is otherwise.

So where a Will, made in a foreign country, has *not been proved*, because the **EASTERN DIS.** laws of that country did not require it, before ordering it to be executed, it *January, 1841.* cannot be registered or carried into effect in Louisiana, without being first **ROBERT F. W. C.** duly proved before one of our courts of probate.

Foreign Wills must be proved in the manner provided by the laws of Louisiana, **ALLIER'S AGENT** if it is not shown that they have been duly proved in the country where made. So an olographic will made in France, and deposited in the office of a notary public there, for execution, without proof of the signature will not be carried into effect in Louisiana, until it be duly proved here, in the court of probates.

This is an action to recover the possession of three promissory notes deposited with a notary and to remain until a competent judicial tribunal shall decide whether they are to be given to the plaintiff or defendant Allier.

The plaintiff, Geneviève Robert f. w. c., (*dite* Aubertine) claims the notes in question, or 6,000 dollars of them, as a legacy made to her natural and acknowledged daughter, Maria Josepha Robert, as her sole heir; the daughter having died in France in 1837.

The defendant Jean Charles Gustave Allier, residing in France, claims the legacy and all the property of the deceased daughter, under an olographic will made in France, but which has been presented to the Court of Probates for the City and Parish of New-Orleans, registered and ordered to be executed, and Louis Pilié appointed dative testamentary executor.

The facts of the case show that Maria Josepha Robert f. w. c. was born in New-Orleans, the 30th July, 1816, and her mother is the present plaintiff. Her father unknown; but she was acknowledged by her mother by an act of procuration passed before a notary public, the 12th June, 1835, in which she gave her consent to her daughter's marriage with Gustave Allier, (the defendant) and appointed Pierre Dupuis to represent her as mother; she residing in Louisiana; her daughter and the other parties in France. The daughter had left New-Orleans with her mother's consent, in 1822; and there remained until her death, the 25th June, 1837, prior to her intended marriage. She died without posterity.

By the will of Louis François René Dupuis who died at Montpellier in France, the 8th November, 1828, a legacy of 6,000 dollars was bequeathed to Maria and the naked pro-

EASTERN DIS.  
January, 1841.

ROBERT F. W. C.  
TS.  
ALLIER'S AGENT

perty of one-third of a further sum of 2,000 dollars was given her, and the usufruct to her mother. By a notarial act of the 28th October, 1839, the notes in controversy were given by the heirs of Dupuis in payment of the legacy of 6,000 dollars; said notes remaining in the hands of the notary, (Th. Seghers) and to be given up to the person entitled to them.

There was an exception filed by the defendant averring that the plaintiff's claim could not be enforced in the present suit, for the will under which he claims the amount of the legacy, has been ordered to be executed and must first be attacked and declared a nullity, and the judgment of the court of probates set aside, before the plaintiff's demand can be allowed; that the decree of said court ordering the will to be executed and appointing a testamentary executor cannot be treated as a nullity or attacked collaterally.

This exception was overruled with leave to plead the matters contained in it, in the defendant's answer.

The general denial was then pleaded and special matters set up in defence. The defendant claimed the legacies and all the property of Maria Josepha under her olographic will, and the notarial act by which the notes claimed, were deposited with the notary; averring that her will was duly probated in France before a competent tribunal, and ordered to be registered and made executory here.

The defendant prays judgment in his behalf for all costs of every description, and sets up his demand in reconvention and claims to be adjudged the sole heir and universal legatee of the deceased testatrix, and as such to be put in possession of all her property.

The Will under which the defendant claims is as follows: "Je donne et legue à Monsieur Gustave Allier que je dois épouser tout ce dont la loi me permet de disposer."

"Betz le 20 Mai mil huit cent trente sept."

Signé, "Maria Josepha Robert."

This Will appears to have been produced in the Court of *Première instance* in France and *enregistered* with a notary

public, who gave the copy. It is not accompanied by any proof. On the production of the copy here, it was admitted to probate as a foreign testament by the Court of Probates in New-Orleans, and ordered to be executed.

EASTERN DIS.  
January, 1841.

ROBERT F. W. C.  
ESQ.  
ALLIER'S AGENT

The law of France is admitted in evidence as contained in the printed Code and work of the French Jurisconsults extant in Louisiana.

The Judge presiding was of opinion the Will was not sufficiently proved to be authentic and that it could not be received as the basis of the defendant's claim to the legacy. He decided however to retain the suit until further proof could be had in relation to the Will in the Probate Court contradictorily with the plaintiff and allowed 6 months time for that purpose.

The defendant appealed.

*Benjamin*, for the plaintiff, and appellee prayed for the amendment of the judgment so as to make it final for the plaintiff instead of allowing further time to the defendant to make out his case. He insisted that the plaintiff was entitled to recover the notes as the property of her deceased daughter she being the sole and forced heir. That the will was neither proved or valid, and the defendant was wholly without title or claim to her estate. The order admitting the will to probate should be disregarded or annulled by this court.

2. Even if under ordinary circumstances we could not attack this judgment of the probate court probating the Will; yet the circumstances of this case form an exception. There existed no probate of the will in question when this suit was brought, nor could we attack it in that court where it had not yet been presented for probate.

3. The existence of a will as a *title* is neither proved nor disproved by the order of execution; no greater weight is given to a will as a title by the order of the court of probate, for such order has been decided by this court to be unnecessary as forming part of a title, 6 *Martin* N. S. 622. 5 *idem* 517.

4. This unnecessary order then cannot have the effect of excluding us from the right of requiring proof of the existence

EASTERN DIS. of the will offered against us. Has any will been proven, No.  
January, 1841. None has been proved in Louisiana.

ROBERT F. W. C.  
TS.

ALLIER'S AGENT

The will is one which cannot be proved abroad. The Art. 1682 in admitting a foreign probate, uses the word *received* in a technical sense. The word *received* as to wills never has reference except to nuncupative wills by public act. See Arts. La. Code, Art. 1570.—1, 4, 1581, 1590, 1641, 1642.—N. Code Art. 971, 972.

5. The reason is to avoid the danger of forgery where foreign laws admit, as in France, less proof than our Code requires. Our Code requires two *credible* persons, *i. e.* known to the Judge as *such*, who have *often* seen the party write. The French Code requires no-such proof. See Sirey Code annoté Art. 970. Note No. 32.

But even if a foreign probate could be admitted this will has never been proven. It is an instrument under private signature. See N. P. Code, Art. 970, 999.

Duranton, vol. 5 chap. Testaments No. 44 and Seq.

Merlin's Repertoire, Verbo *Testament*. Sec. II. § IV. arts. V. VI. particularly No. 3 of art. VI. Merlin, Quest. de Droit, Verbo Testament § VII.

6. If the testament be considered as genuine and proved, the plaintiff maintains that it must be governed by the law of France by which the testatrix a *minor*, could only dispose of one half of her property.—Napoleon Code art. 904. This position is maintained on the grounds :

1. That the will was made in France and intended to take effect there. La. Code art. 10, 1948. Story's conflict of laws, sec. 270 *et seq. idem* 490.

2. That her domicil was in France, because although a minor, as a general rule is domiciled with her natural mother, when without a tutor; yet this domicil may be changed by concurrent consent of the mother and daughter. This concurrent consent is proved by the fact of the minor's having resided fifteen years in France by her mother's consent, and also of her having promised marriage in France with her



mother's consent, whereby her Louisiana domicil became completely divested.

EASTERN DIS.  
January, 1841.

ROBERT F. W. C.  
ES.  
ALLIER'S AGENT

7. Even if the CAPACITY of testatrix is to be governed by the law of her domicil and if that domicil be determined to be in Louisiana, her *intention*, and the *construction* of the will is to be governed by the law of the country where she resided *de facto*, and which she considered as her home as proved by her letter in the record. The terms of the will show that she contemplated a *restricted capacity to bequeath*: that is, that by the law of France she could give half only and she therefore gives "*that of which the law allows her to dispose*" to Allier, leaving her mother as natural heir for the other half. These words would have no meaning if interpreted under the law of Louisiana which allowed her unlimited control over her property.

*L. Janin*, for the appellant, contended that the will under which the defendant claims was proved according to the laws of France, and is valid here. N. P. Code art. 1006, 7, 8, and art. 916, 918 and 920 of the Code of Procedure.

2. But the hand-writing and signature was not proved in France, the French law not requiring it; and the plaintiff bases her objections to the decree of the Court of Probates on art. 1692 of the La. code, which says "that this order of execution (of testaments made in foreign countries and in other states of the Union) shall be granted without any other form than that of registering the testament, if it be established that the testament has been duly *proved* before a competent judge of the place where it was received."

3. The opinion of the legists and courts of France on the verification of the hand-writing of olographic testaments is summed up on pp. 20, 21 and 22 of the 3d vol. of Vazeille's *Résumée*. There is not a little conflict between them, but the weight of authority seems to establish that if the genuineness of the testament is attacked (and not until then) the proof lies on the instituted heir, but when he has been put



**EASTERN DIS.** in possession by an "ordonnance d'envoi en possession" and  
**January, 1841.** there are no forced heirs (art. 1008 of the N. P. code), the  
**ROBERT F. W. C.** burthen of the proof is shifted on the party who opposes  
**vs.**  
**ALLIER'S AGENT** the testament.

4. In the present case the plaintiff is met by the decree of the Court of Probates which cannot be attacked collaterally. This is the universally established doctrine, and were it not the landmarks of our judiciary system would soon be lost, and our courts would soon be engaged in pernicious and inextricable conflicts. 1 La. Rep. 18. 2 *idem*, 249. 5 *idem*, 391. 11 *idem*, 108. 1 Phillips' Evidence, 343, 344. 3 *idem*, 857, 858, 864, 1347.

5. By art. 1681 of La. code no will made in a foreign country can be carried into effect in this state unless its execution has been ordered by the court within the jurisdiction of which the property is situated—by art. 924, No. 1 of the Code of Practice, Courts of Probate have the exclusive authority of ordering the execution of wills. In opposition to these positive laws the extraordinary judgment of the Commercial Court intimates to the Court of Probates that its judgment is erroneous, that it ought to set it aside within six months, and that if this advice should not be taken, the Commercial Court will treat that judgment as a nullity. It is only necessary to carry this reasoning out to analagous cases, in order to discover from the consequences it leads to, how erroneous it is.

*Simon J.* delivered the opinion of the court.

Plaintiff alleges that her natural and acknowledged daughter, *Maria Josepha*, died in France a minor and intestate in May, 1837; that she died unmarried, without descendants, and had never been acknowledged by her father; and that she, the plaintiff, is her sole heir and as such had accepted her succession. She further states that among the property left by her child, there was a legacy of \$6000 and interest, consisting in notes which, by a notorial act, signed by the

interested parties on the 28th of October, 1839, were deposited in the hands of Théodore Seghers, the notary before whom said act was passed; that she is entitled to claim and collect the same as her property, but that said notes are claimed by the defendant, Allier, who resides in France, and is represented here by an agent; that said defendant claims the notes by virtue of a pretended *testamentary deposition*, made in his favor by the deceased Maria, and that it was agreed and stipulated in the said notarial act that said notes should remain deposited in the hands of the notary, until a *competent judicial tribunal* should decide whether they should be delivered to the plaintiff or to the defendant, Allier. She prays that Allier by his agent, and the notary, be both cited, and that judgment be rendered ordering the notes to be delivered to her as her property. Defendant, Allier, excepted to plaintiff's petition, by pleading that a decree of the Court of Probates had ordered the execution of the olographic will of the deceased, by virtue of which, he became entitled to the notes in question; that said decree cannot be treated as a nullity or attacked collaterally, and that this can only be done by a direct action of nullity instituted in the said Court of Probates. This exception was overruled by the inferior court with leave to plead the same in defendant's answer to the merits, and said defendant having joined issue by pleading again the said olographic testament and the decree of the Probate Court ordering it to be executed, which he sets up as *conclusive*, unless set aside by a direct action of nullity, the inferior court rendered a judgment, in which the judge, after recognizing that the subject in litigation is properly and exclusively within the jurisdiction of the Court of Probates, declares to retain the suit, and orders that the defendant, Allier, shall institute a suit against plaintiff in the Probate Court of the parish of Orleans, in order to establish within six

EASTERN DIS.  
January, 1841.

ROBERT F. W. C.  
VS.  
ALLIER'S AGENT

EASTERN DIS.  
January, 1841.

ROBERT F. W. C.  
VS.

ALLIER'S AGENT.

months the validity of the will; and that, if such suit be not instituted within the time allowed, the court *a quâ* shall proceed to the decision of the present suit, considering the proceedings in the Probate Court, relied on by defendant as illegal and null.—From this judgment the defendant appealed.

The facts of the case, as shewn by the record, are these: Maria Josepha, natural daughter of the plaintiff was born in New Orleans on the 30th of July, 1816; she went to France with her mother's consent in 1822, remained there ever since, and died in June, 1837, without posterity. In 1828, a legacy of upwards of \$6000, (which is the object in controversy in this suit) accrued to her from the testament of one Dupuis. The deceased left an olographic will, by which she gave and bequeathed to the defendant, Allier, with whom she was to be married, all that the law permitted her to dispose of; and a short time after her death, such proceedings were had, at the request of the universal legatee, before the French judicial authorities and according to the French laws, that on the 18th of July, 1837, the said testament and its envelope were ordered to be deposited, and were so deposited, in the office of a notary public for that purpose appointed by the president of the tribunal; an inventory of the estate was subsequently made.—The will was not proven, as, in France, the law does not require proof of the hand-writing and signature of an olographic will, and as, according to those laws, it is only when its genuineness is attacked that such proof becomes necessary. There is, however, no evidence in the record, showing that the testamentary heir ever was put in possession of the estate, according to art. 1008 of the French code, and this is perhaps immaterial for the decision of the question under consideration.—On the 17th of December, 1838, plaintiff presented a petition to the Court of Probates, to be

authorized to accept the succession of her daughter under the benefit of inventory, and to be appointed administratrix thereof.—On the 28th of October, 1839, a notarial act was passed before Theodore Seghers, in and by which the parties now before us agreed that the notes in question, belonging to the estate of plaintiff's daughter, should remain deposited in the hands of the notary, until they could settle the matter in dispute amicably between themselves, or obtain thereon the decision of a competent tribunal.—Until the filing of the petition in this case, no proceeding had been had before the Court of Probates in relation to the will; but immediately after, (the dates have been changed by consent of parties,) a petition was presented by defendant to the judge of said court, who ordered the testament in controversy to be recorded, homologated and executed, appointed Lewis Piliè as dative testamentary executor, and in the mean time ordered an inventory of the property of the succession to be taken in the presence of the parties interested; which was done accordingly. A few days afterwards, the dative testamentary executor obtained from the Court of Probates, a rule on the plaintiff in this suit to show cause why the notes therein alluded to should not be delivered to him, to be by him administered in the same manner as the other property of the estate, which rule was excepted to by said plaintiff on several grounds, among which the pendency of the present suit is pleaded. What became of this rule and of the exceptions, the record does not inform us. All the proceedings had in France in relation to the testament in question and those had before the Court of Probates, are contained in the record.

In this state of the case, we are called upon by both parties to give a definitive decision on their respective rights to the succession of *Maria Josepha*; they both complain of the judgment of the inferior court; and it is contended on the part of the plaintiff, that having shewn her title to

EASTERN DIS.  
January, 1841.

ROBERT F. W. C.  
VS.  
ALLIER'S AGENT

EASTERN DIS.  
January, 1841.

ROBERT F. W. C.

VS.

ALLIER'S AGENT

the notes in dispute, as the sole heir of the deceased, the defendant could only succeed by proving a better title; that the will under which he sets up his title had never been proved, that the decree of the Probate Court ordering it to be executed, having been rendered *ex parte*, cannot have any legal effect against her, and that therefore she is entitled to the possession of said notes. She also maintains that if the testament be considered as genuine and proved, its dispositions are to be governed by the laws of France, according to which, the testatrix could only dispose of one-half of her property.

It is insisted on the part of the defendant that the decree of the Court of Probates is definitive and cannot be attacked collaterally; that at all events, it was not necessary to prove the hand-writing and signature of the testatrix previous to obtaining the order of execution, and that said decree is a sufficient title under which he ought to be allowed to claim and recover the notes from the depository.

The admission of a will to probate and the order given for its execution are only preliminary proceedings necessary for the administration of the estate, and do not amount to a judgment binding on those who are not parties to them.

We are not ready to say that the decree of the Court of Probates, ordering the will to be executed, ought to be so binding upon the plaintiff, who was not made a party to the proceedings, as to preclude her from questioning or disputing its legal effect or validity before the proper tribunal, and showing that it was rendered without sufficient evidence; for, as this court has several times held, the admission of a will to probate and the order given for its execution, are only preliminary proceedings necessary for the administration of the estate, and do not amount to a judgment binding on those who are not parties to them.

Courts of general jurisdiction cannot sustain an action to establish a will and decree its execution and the recovery of the property claimed under it.

—11 *La. Rep.*, 388, 392.

On the other hand, we are not disposed to deny to the defendant the right of proving the olographic will of the deceased, according to law, before the competent tribunal, contradictorily with the plaintiff, *C. Pr.*, art. 935; and of

recovering under said will, if, after having adduced such evidence as may be deemed necessary to support it, its execution be decreed according to our laws; but this cannot be done in the present suit.

EASTERN DIS.  
January, 1841.

ROBERT F. W. C.  
VS.  
ALLIER'S AGENT

This action cannot properly be called an *action of revendication* of property in the possession of a testamentary heir or universal legatee, as the defendant has never been put in possession of the estate of the testatrix; and although he sets up the will as the basis of his title to the notes which he claims, we cannot now decide upon its validity and legal effect; as, according to the opinion hereinafter expressed, it has never been probated in a legal manner. On the question of jurisdiction arising from the state of the case, we understand the distinction repeatedly made by this court to be, that whenever the validity or legality of a will is attacked and put at issue (as in the present case) at the time that an order for its execution is applied for, or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into possession of the estate under it, Courts of Probate alone have jurisdiction to declare it void, or to say that it shall not be executed. This is the purport and extent of the decision in the case of *Lewis' heirs vs. his Executors*; 5 La. Rep. 387.—C. of Pr.

Whenever the validity of a will is attacked and put at issue, at the time that for its execution is applied or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into the possession of the estate under it, Courts of Probate alone have jurisdiction.

art. 924, § 1.—But when an action of revendication is instituted by an heir at law, against the testamentary heir or universal legatee who has been put in possession of the estate, and who sets up the will as his title to the property, District Courts are the proper tribunals in which such suits must be brought.—6 *Martin's N. S.*, 263.—2 *La. Rep.* 23.—11 *idem*, 388 and 392.—In this case the parties appear to have fully understood this distinction, as it is specially provided in the notarial act of the 28th of October, 1839, that the notes shall remain in the hands of the notary, until their respective rights and pretensions under

In an action by an heir at law, against the testamentary heir or universal legatee, who is in possession and sets up the will as his title to the property, the district courts, or courts of general jurisdiction are the proper tribunals in which such suits must be brought.



EASTERN DIS. OF against the will of the deceased, shall have been decided upon (contradictorily) by a competent tribunal. This

January, 1841.  
ROBERT F. W. C.  
VS.

ALLIER'S AGENT

competent tribunal, from whom a rule to show cause was afterwards obtained, was necessarily the Court of Probates, who alone had jurisdiction to order or refuse the execution of a will; and we are at a loss to conceive what may have been the views of the plaintiff in bringing this suit before the Commercial Court.

We therefore agree with the judge *a quo* that the present litigation should be gone through before the Court of Probates; and as, in our opinion, the decree of said court ordering the will to be executed, cannot prejudice the plaintiff who was not a party to the proceedings; and as the defendant cannot be precluded from proving in a legal manner the olographic testament under which he claims, we think the inferior court ought not to have retained this suit, and that the matter in controversy ought to be wholly submitted to the proper tribunal, on a continuation of the proceedings under the rule already obtained, and which will present the real issue between the parties. We come the more readily to this conclusion, that if the will be regularly proved, there may arise a question already presented by the pleadings in this case, in relation to the extent of the testamentary disposition, and to the portion of her estate which the testatrix could legally dispose of, which question is also exclusively within the jurisdiction of the Court of Probates.—*C. of Pr., art. 924, § 14—art. 1022.*

Notwithstanding the opinion above expressed, which puts an end to this suit before the Commercial Court, we shall now proceed to examine the question so much debated in argument: whether the Court of Probates ought to have required proof of the hand-writing and signature of the testatrix, before ordering the execution of the will in controversy? Under the laws of France, see *Napoleon code, arts. 1007,*



1008.—*Syrey's code annoté*, art. 970, note No. 32.—*Code de procéd. civ.*, art. 916, 918.—proof of the execution of an olographic testament is not required, and after certain proceedings which are certified to in a process verbal signed by the president of the *tribunal de première instance*, the testament is deposited in the office of a notary public *par lui commis*. All this appears to have been done in the matter of the will of Maria Josepha, and it is therefore well established that the hand-writing and signature of the testatrix have not been proven in France. In conformity with the 1681st art. of the Louisiana code, testaments made in foreign countries cannot be carried into effect on property in this state, unless they have been duly registered and ordered to be executed; and the art. 1682 provides that: "*this order of execution shall be granted without any other form than that of registering the testament, if it be established that the testament has been duly proved before a competent judge of the place where it was received. In the contrary case, the testament cannot be carried into effect, without its being first proved before the judge of whom the execution is demanded.*" From this text of our laws, we are clearly satisfied, without being necessary to enquire into the meaning of the word "received;" that if a testament made in a foreign country *has not been proved*, because the law of that country did not require it to be proved before ordering its execution, it cannot be carried into effect in Louisiana, without being first duly proved before one of our Courts of Probate. In the case of the *State vs. the Probate Judge of Iberville*, 8 *Martin's N. S.* 585, this court said: "we admit to probate wills made out of the state, which have been received elsewhere, but we require proof of their execution where this sanction has not been bestowed on them." This doctrine is certainly correct; no distinction is made as to its being necessary or not to prove such wills in the place where they were received, and when such proof is required here, it must be made in the manner provided

EASTERN DIS.  
January, 1841.

ROBERT F. W. C.  
TS.

ALLIER'S AGENT

In France, proof of the execution or signature to an olographic will is not required to make it executory. In this state it is otherwise.

So where a will, made in a foreign country has not been proved, because the laws of that country did not require it, before ordering it to be executed, it cannot be registered or carried into effect in Louisiana, without being first duly proved before one of our courts of Probate.

EASTERN DIS. by our laws. In the case of a nuncupative testament  
January, 1841.

ROBERT F. W. C.

TS.

ALLIER'S AGENT

Foreign wills must be proved in the manner provided by the laws of Louisiana, if it is not shown that they have been duly proved in the country where made.

by public act, which is full proof of itself, unless alleged to be forged, the production of a duly authenticated copy, will perhaps dispense with the proof of its execution in any other mode, as it is provided for in our own codes: *La. code, art. 1640—C. of Pr. art. 930*; but when effect is sought to be given to an olographic testament or any other which does not carry on its face the proof of its genuineness, we think that if it is not shown that it has been duly proved elsewhere, the protection afforded to our fellow citizens by the laws of their country, is particularly called for; and that their property should not pass into foreign hands, without previously requiring as strict a compliance with the requisites of the Louisiana codes as they may themselves be subjected to.

So an olographic will made in France, and deposited in the office of a notary public there, for execution, without proof of the signature will not be carried into effect in Louisiana, until it be duly proved here in the court of probates.

We cannot therefore consider the order to deposit the will in question in the office of a notary, or any other subsequent proceeding had under the French laws, as tantamount to the proof required in the 1682d article of our code; and we have thought proper to decide this point with a view to instruct the judge of probates that he ought not to order the olographic will of Maria Josepha Robert to be carried into effect, without its being *first* proved before him according to law; unless satisfactory evidence is produced to show that it has been duly proved in France.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed that there be judgment against the plaintiff as in case of nonsuit, and that she pay costs in both courts.

**BUISSON vs. HYDE, ET AL.**EASTERN DIS.  
January, 1841.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

**BUISSON  
vs.  
HYDE.**

Where a bond is taken payable to A B, sheriff, &c., he cannot sue in his individual capacity to recover the amount from the obligors, when there is no evidence that he acquired any right to it but the bond itself.

It is not certain that an ex-sheriff could recover on a bond taken payable to himself as Sheriff, after he is *functus officio*.

This is an action in the name of the former sheriff of parish of Orleans, on a judicial bond taken from the purchasers of the steamboat Baltic, sold at sheriff's sale. The bond *was taken and made payable to him as sheriff*, while he held the office, but this suit was instituted since his resignation.

The defendants among other defences excepted to the right of the plaintiff to sue on the bond; which was overruled.

Hyde answered that he had made a surrender and could no longer stand in judgment.

Fowler, the other defendant, pleaded the general issue, and denied specially the plaintiff's right to sue in his individual capacity; that the bond was taken by him in his official capacity of Sheriff; and that upon its face it appeared the right of property was in others, and therefore the plaintiff could not sue. The bond sued on was taken for part of the price of the steamer Baltic, which had been seized at the suit of the Fulton Company *vs.* Wright, and sold by order of court. There was judgment for the plaintiff, and it was ordered that it be paid out of the proceeds of the steamboat Baltic, sequestered in the suit. The defendants appealed.

Chinn, for the plaintiff, urged the affirmance of the judgment.

Lockett & Micou, for the appellants, insisted that the judgment should be reversed. On the face of the bond it was shown that it either belongs to the present sheriff, as

**EASTERN DIS.** the successor of Buisson, or to the parties to the suit in January, 1841. which it was taken.

**BUISSON**  
**vs.**  
**BYDE.**

2. Buisson has ceased to have any interest in the bond. His endorsement on the back of it shows that he holds it only as sheriff, and had no right to retain it, or take it from the sheriff's office.

*Elmore & King*, for the plaintiff and appellee, in reply, contended that the sale made by Buisson was not such a sale, as necessarily belonged to his capacity as sheriff. It was not a sale under execution or writ, or even order of court, properly speaking, but was in fact made by consent of parties and might have been performed by any one else, as the sheriff. The person making the sale would have acted as the agent of the parties; and having the right to sell would certainly have the right to collect and receive the money for the sale.

2. In the case before the court, Buisson was the agent for all the parties. The sheriff could be agent as well as any other person. But the parties would more readily consent to the sale when they knew that the agent selected to make it was the sheriff of the parish.

*Simon J.* delivered the opinion of the court.

The plaintiff sues to recover the amount of a bond given by defendants as part of the price of the steamboat *Baltic*, sold in the course of judicial proceedings. It appears from the bond sued on, that the steamboat *Baltic* having been seized at the suit of the president and directors of the *Fulton Company* against *J. J. Wright et al.*, was adjudicated to one of the defendants by the plaintiff in his capacity of sheriff of the parish of Orleans, for the sum of \$8700; for a part of which, this bond was given. Said bond is made payable to *Frederick Buisson, Sheriff of the parish of Orleans*, and must have been given for the benefit of the parties to the suit in which the property was ordered to be sold, and subject to its being regularly transferred to them by the officer who made the sale and took the bond.

The plaintiff's right to sue in his individual capacity is disputed by defendants, on the ground that the bond does not belong to him, but is the property of other persons; and it is further contended that he could not recover in his capacity of sheriff, because he was not sheriff at the time that this suit was instituted, having previously resigned his office. The judge *a quo* sustained the action, gave judgment in favor of the plaintiff's, from which judgment defendants appealed.

EASTERN DIS.  
January, 1841.  
BUISSON  
vs.  
HYDE.

The plaintiff sues on this bond in his *individual capacity*, and seeks to recover its amount as his property; there is no evidence in the record to show that he ever acquired any right to it but *the bond itself*; and on its face it is apparent that he had no other interest or object in taking the bond but the execution of an order of a court of justice in his official capacity. He acted as the legal agent of the parties under the order or judgment of the court, and the bond was undoubtedly made for their benefit. We think that the bond alone is not sufficient to entitle the plaintiff to recover, and that he ought to have established his right of ownership by evidence *dehors* the instrument, such as a transfer from the parties really interested or other satisfactory evidence; or at least by shewing that he is personally liable to pay the amount thereof to the persons for whose benefit the sale was made. Under the pleadings and in this state of the case, we think the plaintiff has shewn no right to recover, and that the judge *a quo* erred in giving judgment in his favor. *De non apparentibus et de non exstantibus, eadem est lex.* Where a bond is taken payable to "A. B., Sheriff, &c." he cannot sue in his individual capacity to recover the amount from the obligors, when there is no evidence that he acquired any right to it but the bond itself.

Our judgment must be for the defendants, as in case of nonsuit. It is not certain that an ex-sheriff could recover on a bond taken payable to himself as sheriff, after he is *functus officio*.

Had this suit been brought by the plaintiff in his former official capacity, we are not ready to say that he could have sustained the action, since he was *functus officio*, and could no longer act as the legal agent of the parties litigant.

It is therefore ordered, adjudged and decreed, that the

**EASTERN** Dis. judgment of the Commercial Court be annulled, avoided and  
**January, 1841.** reversed; and that there be judgment in favor of the defend-  
**BUISSON** ants against the plaintiff, as in case of nonsuit, with costs  
**vs.** in both courts.  
**HYDE.**

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### BUISSON vs. HYDE ET AL.

#### ON A RE-HEARING

A sheriff's bond, taken under an order of court, *payable to him as sheriff*, for the price of property sold gives him no right to the bond in his former capacity of sheriff, when he has resigned, as the legal agent of the parties interested and less so in his individual capacity.

A Sheriff having ceased to be a public officer he has no longer any right to keep, or collect any bonds given to him as sheriff in execution of any order of court.

Where a bond is taken to the sheriff in his official capacity, although it be not *payable to his successors in office*, yet, on his resignation his successor ought to be the judicial depository of the bond.

In this case a re-hearing was prayed for on the part of the plaintiff and granted.

*Chinn*, for the plaintiff, contended that the sheriff was the proper person to take the bond in question. Buisson was the sheriff, the bond was payable to him as sheriff; he had a right to collect and receive the money on it; hold it subject to the right of the parties litigating about the proceeds and pay over the money to the party entitled to receive it. If he had the right, and it was his duty to do this, he certainly is the proper person to sue. The amount of the bond is payable to him and *not to his successor in office*.

2. As sheriff, Buisson must consummate the work he had commenced, even after the term of his office expired, and a successor appointed. He may sue on a bail bond, or assign it to the plaintiff. 2 Bacon's Abridgment; *Verbo Sheriff*, page 343. 1 *Idem* 17, 3 Salkeld 322.



3. The new sheriff could not sue; he had no cause of action or interest in the matter. The many parties who were creditors of the Steam Boat could not sue, for neither of them had any determinate interest; and if they were to sue and recover, either of them could receive the whole sum whether intitled to it or not, and thereby defeat the end sought to be attained.

4. It cannot be denied that if the obligors in the bond had made payment to Buisson that it would have been a complete discharge, although another sheriff was appointed. Buisson was acting for himself and as agent for others, constituted by the law or by themselves, it is immaterial which. He had also a claim on the fund for his fees, and had consequently an interest, and was acting for himself. Payment to Buisson would have been a legal payment. La. code, art. 2141.

EASTERN Dis.  
January, 1841.

BUISSON  
vs.  
HYDE.

*Elmore and King* on the same side.

*Micou*, contra.

*Simon J.* delivered the opinion of the court.

When we granted the re-hearing of this case, we entertained a doubt as to the correctness of our former opinion, and therefore consented cheerfully to give to the plaintiff's counsel an opportunity of shewing us that our doubt was well founded, and that our decision should be revised and corrected. But after an attentive and mature reconsideration of the question presented in argument, we have felt no hesitation in coming again to the same conclusion, and in saying that our first judgment ought not to be changed.

One of the plaintiff's counsel has contended that the payment of the bond sued on, if made to the plaintiff, would be a legal payment, and he has referred us to the 2141<sup>st</sup>. art. of the Louisiana code, the second paragraph of which, is in these words: "payments in general can legally be made only, when the person to whom the payment has been made, was at the time in possession of the evidence of the debt, under an order of a competent court, as syndic or trustee of creditors, as curator, executor, heir, or by virtue of any office or other trust,



EASTERN DIS. that apparently gives him the power to receive the payment." January, 1841. It is evident from this article that if the bond sued on, was

BUISSON  
VS.  
HYDE.

A sheriff's bond taken under an order of court, payable to him as sheriff, for the price of property sold, gives him no right to the bond in his former capacity as sheriff, when he has resigned, as the legal agent of the parties interested and less so in his individual capacity.

A sheriff having ceased to be a public officer he has no right to keep, or collect any bonds given to him as sheriff in execution of any order of court.

Where a bond is taken to the sheriff in his official capacity, although it be not payable to his successors in office, yet on his resignation, his successor ought to be the judicial depository of the bond.

now to be paid to the plaintiff, who, from resignation, has for some time, ceased to be the sheriff of the Parish of Orleans, and who, therefore, though in possession of the evidence of the debt, could not be said to be *at the time of the* payment, in possession of said evidence of debt, by virtue of any office or other trust, within the meaning of the law, that apparently would give him the power to receive it, such payment would certainly be illegal. The order of court under which the bond was delivered to plaintiff and made payable to him as sheriff, cannot have such an effect as to permit him now to set up a claim or right to the said bond in his former capacity of sheriff or as the legal agent of the parties interested, and less so in his *individual capacity*. His duty under the order from court and the consent of the parties on which it was rendered was to bring before the court, the funds and bonds proceeding from the sale of the property for cash and at credit, in order that they be so produced for the discharge or benefit of the seizing or attaching creditor, or to be restored, after the decision of the suit, to the person against whom the seizure was levied, in case said seizure be raised; and the seizing creditor was bound to pay him his legal fees.—

*Louisiana code, articles 2946 and 2949.* Having ceased to be a public officer, he has no right to keep, preserve or collect the bond in question, in execution, of the order of the court.

*Idem, art. 2950,* and although the bond is not made payable to the plaintiff's successors in office, it is clear that, as it was taken in a judicial proceeding, for the benefit of the parties therein interested, the bond did not belong to him, and that the actual sheriff ought now to be the judicial depository of said bond, legally authorised to preserve it or to collect its amount. The circumstance that it was made payable to the plaintiff's executors, administrators or assigns, cannot change the legal destination of the obligation sued on, and all that the former sheriff has to do, would be to assign it to his successor in the same capacity.

It has been intimated or rather suggested that there would

be no danger in giving judgment in favor of plaintiff, as he would surely remit the funds to the party intitled to them under the definitive judgment of the court, and that thereby the ends of justice would be attained, without any injury to any person: we are aware that the money proceeding from the collection of the bond sued on, would be perfectly safe in the hands of the plaintiff, who, in the exercise and discharge of his official duties as sheriff of the parish of Orleans, has always shewn himself an able, efficient and faithful officer; but the law appears to us imperative, and we cannot in any case deviate from what we consider to be its true and clear provisions.

We are therefore, of opinion that our former decision ought to remain undisturbed.

EASTERN DIS.  
January, 1841.  
WALLACE & CO.,  
vs.  
HARTY & JONES.

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**WALLACE & CO. vs. HARTY & JONES.**

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.**

The purchaser who has paid before the disturbance of his possession, cannot demand restitution of the price *or security*, according to article 2538 of the code, and the same rule applies to *such portion* as happens to be paid at the time of the disturbance.

So where suit is brought on one of several notes given for the same object, the defendants can only require security for the amount of the note sued on, in case of disturbance of possession or title.

This is an action instituted on against the maker and endorser of a promissory note.

The defendants denied that the plaintiffs were the owners of the note, but that it belonged to one Daniel Murphy and was given to him in part payment of the price of certain lots of ground in Lafayette, for which

**EASTERN DIS.** a suit has since been instituted by the heirs of Poultney, and is now pending. They also propounded certain interrogatories to the plaintiffs touching the ownership of the note, which they pray may be answered and the suit dismissed. The interrogatories remained unanswered and judgment was rendered against the defendants, for \$1412 50, the amount of the note, with a stay of execution until the plaintiffs give security in the sum of \$8000 which was the whole of the price of the lots. The plaintiffs appealed.

**January, 1841.**  
**WALLACE & CO.**  
 vs.  
**HARTY & JONES.**

*C. M. Jones* for the plaintiffs insisted that security should only have been required for the amount of the note sued on, and not for the whole price; and prayed that it be corrected accordingly.

*McKinney* contra.

*Morphy J.* delivered the opinion of the court.

The defendants being sued as the maker and endorser of a promisory note of \$1412 50, averred that the plaintiffs had no right or interest in the same; that it belonged to one Daniel Murphy, to whom it had been given in part payment of certain lots of ground situated in the suburb Lafayette, in the parish of Jefferson; and that a suit had been instituted and was still pending in the Circuit Court of the United States, by the heirs of Poultney, who asserted title to the said property. In order to prove plaintiffs' want of interest in the note sued on, defendants propounded to them interrogatories, which remained unanswered. There was a judgment below for the plaintiffs but with a stay of execution until such time as they should furnish bond according to article 2535 of the Louisiana Code, for the amount of the purchase money, to wit: \$8000.

The purchaser who has paid before the disturbance of his possession, cannot demand restitution of the price or security according to art. 2538 of the code; and the same rule applies to such portion as happens to be paid at the time of the disturbance.

The plaintiffs and appellants contended that bond should have been required of them only for the amount sought to be recovered; we think with them, that the court erred. Article 2538 of our Code provides that "if the purchaser has paid be-

fore the disturbance of his possession, he can neither demand a restitution of the price nor security during the suit." The rule thus laid down for the whole price when paid, must, we apprehend, apply to such portion of it as happens to be paid at the time of the disturbance. The record shews that the note sued on, is the last that became due of several others given or assumed in payment of the price, but we are uninformed whether they have been paid at maturity; if they have, the purchaser is not intitled under the provision just quoted, to demand any security for their amount; if they be yet due, no security can be exacted until suit be brought on them by the vendor or any other holder.

EASTERN Dis.  
January, 1841.

MARSH & CO.  
vs.  
BARNES  
& TILGHMAN.

So where suit is brought on one of several notes given for the same object, the defendants can only require security for the amount of the note sued on, in case of disturbance of possession or title.

It is therefore ordered and adjudged that the judgment of the District Court be so amended that the bond to be furnished by plaintiffs be only for the amount of the note sued on, to wit: \$1412 50, instead of \$8000; and that the appellees do pay the cost of this appeal.

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**MARSH & CO. vs. BARNES & TILGHMAN.**

**APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.**

Appeal dismissed; the certificate of the clerk not stating that the record contained all the evidence adduced on the trial.

This is an action against the defendants as makers of a note. There was judgment against them (Barnes & Tilghman) in solido. Barnes appealed, considering himself only liable for one half of the debt; it being for a particular partnership.

The certificate of the clerk states the "transcript contains all the proceedings, as well as documents filed in the cause," but does not say it contains all the evidence adduced &c.

**EASTERN DIS.**  
**January, 1841.**

**OLIVER**  
**vs.**  
**GWIN.**

*Collens* for the appellant, insisted that the defendant Barnes, was only liable for one half the plaintiff's demand (if any), because it was only a particular partnership the defendant was concerned in.

*Morphy J.* delivered the opinion of the court.

Barnes one of the defendants is apellant from a Judgment against both as the makers of a promisory note.

Appeal dismissed; the certificate of the clerk not stating that the record contained all the evidence adduced on the trial.

The certificate of the Clerk attests that the transcript contains all the proceedings had, and all the documents filed in the case, but it does not inform us that it contains all the evidence adduced on the trial. We are, therefore, unable to examine the case on its merits and the appeal must consequently be dismissed with costs in both courts.

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**OLIVER vs. GWIN.**

**APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.**

Where no property of an absent defendant has been seized in a suit by attachment, no judgment can be rendered against him, and the attachment will be set aside.

When the plaintiff in attachment points out persons in whose hands he expects to find property of his debtor and makes them garnishees and they by their answers show there is none, the suit cannot be maintained.

The seizure of any property, however small, will support an attachment; and the attachment extends to every species of property; to all rights and credits and to partnership property, in a suit against one of the members of a firm.

Where garnishees, intervene, claim and bond, the property attached on the ground that it belongs to them, it is no appearance in court on the part of the defendant, and cannot give jurisdiction.

This is an action against the defendant W. M. Gwin, a resident of the State of Mississippi, as the second endorser of a

promisory note. The suit was commenced by attachment, and A. A. Halsey & Co., the President and Cashiers of the Canal, the Commercial, the City, the Union, the Merchant's and the Atchafalaya Banks, were all cited as garnishees; and an attorney appointed to defend the absent defendant. The garnishees were required to answer the following interrogatories:

OLIVER  
vs.  
GWIN.

1. Have you in your possession, or under your control any monies, notes, bills of exchange, cotton, merchandise, or property of any description belonging to A. A. Halsey & Co. or to Wm. M. Gwin, either in whole or in part. If yea, state particularly what amount you have belonging to Halsey & Co. and what to Wm. M. Gwin.?

2. Is or is it not to your knowledge that Wm. M. Gwin is a partner in the house of A. A. Halsey & Co.?

All the Banks negatived each of these interrogatories, except the Union Bank, which answered as follows: "The Bank has not in her possession any property of any description belonging to Wm. M. Gwinn. To the credit of A. A. Halsey & Co. there stands on the books of the Bank a balance of \$1497, 49; and there are deposited by them for safe keeping, three boxes, contents unknown, marked J. M. Bell. 2. We understand that Wm. M. Gwin is a partner in the house of A. A. Halsey & Co.

This suit was instituted the 27th January 1840, and on the 10th February following, the firm of A. A. Halsey & Co. instead of answering on their garnishment, intervened in the suit. They allege their firm is composed of A. A. Halsey, who resides in New-Orleans, and Wm. M. Gwin, residing in Vicksburg, and that they are the owners of the sum of \$4346 49, deposited in the Union Bank to their credit and attached in this suit; that the suit is against Gwin alone, and the firm is and was not at the time of the attachment, indebted to Gwin; but on the contrary, he was and is largely indebted to it; and that the firm

EASTERN DIS.  
January, 1841.

OLIVER  
vs.  
GWIN.

was and is largely indebted on account of partnership transactions, greatly beyond any amount of profits to which Gwin was, before or since the attachment, entitled. They allege that the plaintiff has been amicably requested to release said funds and has refused, whereby, they have sustained damages, and pray judgment in reconvention for their damages, and that said funds, or money attached, be released and decreed to be their property. To this petition of intervention and reconvention the plaintiff pleaded a general denial. The intervenors took a rule on the plaintiff which was made absolute, allowing them to bond the money and funds attached.

The attorney of the absent defendant now filed exceptions, or plea in abatement, to the action and jurisdiction of the court, on the ground that the defendant was not in court either by personal citation or attachment of his property, and prayed that the suit be dismissed.

In answer to the merits he pleaded the general issue; and averred, after admitting his signature, that he endorsed his name on the note when it was a blank piece of paper and that it was filled up for the sum of \$6500, instead of a sum not exceeding \$2000 and discounted in one of the Natchez Banks as was agreed on, but has been discounted or sold to the Tombigbee Bank by the person to whom the note was originally given in blank, and that this person and the bank colluded and fraudulently filled up the note for a larger amount than was intended or authorised, and discounting it in their own paper, worth but 25 cents in the dollar. That the plaintiff, with a knowledge of these facts, and when the defendant was about to file a bill against the officers of the Tombigbee bank, and Besançon, who obtained the note, filled it up and had it discounted; for the purpose of cancelling it, took said note from the bank at a price greatly below its nominal value, for the purpose of defeating every equitable defence against it. He prays that he be allowed every



equitable defence against said note which would be allowed by the laws of Mississippi, where it was executed, and that he have judgment, cancelling and annulling it.

EASTERN DIS.  
January, 1841.

OLIVER  
VS.  
GWIN.

After all these pleadings were put in, on the 25th March, 1840, Halsey & Co. answered the interrogatories which had been propounded to them as garnishees :

1. To the first interrogatory they say the firm had \$4,341 64 on deposit, and office furniture worth about \$150.

2. That Gwin was a member of said firm when the attachment was served, but was indebted to it at the same time, for advances, groceries and other goods, etc. furnished, \$45,850 67, or thereabouts, and still owes this sum, for the payment of which the firm has a privilege and preference on said deposit, which forms alone all the partnership effects. That on the first day of February, 1840, Gwin withdrew from the firm and has ceased, since, to be a member.

Upon all these pleadings and issues the parties went to trial.

There was a mass of testimony taken on commission in Mississippi, in relation to the merits and consideration of the note sued on.

On the trial, the Judge presiding, overruled the plea to the jurisdiction or insufficiency of the attachment and proceed to try the case on its merits.

He considered that the plaintiff had purchased a litigious right in buying this note, and having paid for it in depreciated bank paper, he was in equity not entitled to recover more than \$2,000. Judgment having been rendered for this sum, the plaintiff appealed.

*Jones & Chinn* argued the case on the part of the plaintiff, and urged that there should be judgment for the whole amount of the note sued on.

*Payton & Rozier* for the defendant, prayed that the judgment be reversed and that one be given for the defendant

**EASTERN DIS.** with his costs. The case was fully argued on the plea to the *January, 1841.* jurisdiction and the merits.

**OLIVER**

**VS.**

**GWIN.**

*Simon J.* delivered the opinion of the Court.

Plaintiff seeks to recover a sum of \$6500, which he alleges, defendant owes him as endorser of a promissory note. Defendant, being a resident of the State of Mississippi, was cited by attachment, which, in conformity with the prayer of the petition, was levied on certain monies, effects and property stated to belong to said defendant, in the possession of several banks of this city, and of the commercial firm of A. A. Halsey & Co. They were all cited as garnishees, and interrogatories were propounded to them, which they severally answered under oath, as follows: The New-Orleans Canal and Banking Company, the Commercial Bank of New-Orleans, the City Bank, and the Atchafalaya Bank, all answered that they had nothing in their possession belonging either to the house of Halsey & Co or to the defendant. The President and Cashier of the Union Bank of Louisiana, stated that the Bank had not in their possession any property of any description belonging to W. M. Gwin, but that there was at the credit of A. A. Halsey & Co. on the books of the Bank, a balance of \$1497 49, and also deposited by them for safe keeping, three boxes, contents unknown, marked J. M. Bell; and the firm of A. A. Halsey & Co. answered: 1st. That "at the time of service on said firm of the interrogatories and attachment, they had not in their possession or under their control any moneys, notes, bills of exchange, cotton, merchandize or property of any description, belonging to A. A. Halsey & Co., or to the defendant, either in whole or in part, excepting certain bank notes on deposit, specie, and office furniture, all amounting to \$4491 64, belonging to said firm; and that they were ignorant of any other property or effects to be added to those above specified."—2d. That

"W. M. Gwin, was, at the time of said service, a partner in the firm of A. A. Halsey & Co., and was then indebted to said firm for monies advanced to and for him, groceries furnished to him, and liabilities theretofore incurred by the firm at his request and for his benefit, and all paid by said firm previous to the said service, except a sum of \$6000 all which monies, groceries and liabilities exceed the value of the interest of defendant in the whole partnership property as above specified, by \$45,850 67, which said defendant, at the time of service of said interrogatories and attachment, owed and still owes; and for the payment of which said firm has a privilege or preference over the plaintiff on the said notes, specie and furniture forming the *whole partnership effects*."—And 3d that "on the first of February, 1840, defendant withdrew and ceased to be a member of the firm of Halsey & Co., and has never since been a member of said firm." On the tenth of February, 1840, the firm of A. A. Halsey & Co. intervened in the suit to claim said notes, specie and furniture contradictorily with the plaintiff; on the 12th, a rule was obtained, ordering plaintiff to shew cause why the intervenors should not be allowed to bond the boxes of silver, etc., attached in the case, on the grounds on file; which rule was made absolute, on the ground that said money was the property of A. A. Halsey & Co.—On the 5th of March, said firm filed a bond, in consequence of which the property was released and the attachment set aside; and on the 25th ensuing, the interrogatories propounded to them as garnishees, were answered and filed, and no exception was taken to their admissibility.—An attorney having been appointed by the court to represent the absent defendant, he excepted to the jurisdiction of the court, on the grounds that said defendant had not been served personally with citation, nor had any property or interest been attached in the suit; prayed the dismissal of the action, and in case the plea should be

EASTERN DIS.  
January, 1841.  
OLIVER  
vs.  
GWIN.

**EASTERN DIS.**  
**January, 1841.**

**OLIVER**  
**VS.**  
**GWIN.**

overruled, filed an answer to the merits. The record does not show that any attempt was made to disprove the answers of Halsey & Co. to the interrogatories propounded to them as garnishees; the plea to the jurisdiction and the intervention, do not appear to have ever come under the notice of the court, though issue was joined by plaintiff on the petition of intervention; the case was tried on its merits, and the Judge *a quo* rendered judgment in favor of the plaintiff against Gwin for the sum of \$2000, without even alluding in his written opinion to the attachment which had brought the defendant before him; from which judgment said plaintiff appealed.

Where no property of an absent defendant has been seized in a suit by attachment, no judgment can be rendered against him, and the attachment will be set aside.

It is first insisted on the part of defendant's counsel, that this action cannot be maintained, as no property has been proven to belong to said defendant, who, therefore, is not properly in court; and we are called upon, by the issue joined on the appeal, to give effect to the declinatory exception by him filed.

When the plaintiff in attachment points out persons in whose hands he expects to find property of his debtor & makes them garnishees and they by their answers show there is none, the suit cannot be maintained.

It is perfectly clear that if no property of the defendant has been seized under the writ, no judgment can be obtained against him, and the attachment or the bond given under it, must be set aside and the suit dismissed.—*6 Martin, 572.*—*3 Martin N. S., 321.*—In this case, the plaintiff pointed out in his petition the persons in whose hands property could be found and attached, and the Sheriff levied the writ accordingly; he made them garnishees, and thought

The seizure of any property however small, will support an attachment; and the attachment extends to every species of property; to all rights and credits and to partnership property in a suit against one of the members of a firm.

necessary to probe their consciences by propounding interrogatories, the answers to which show that plaintiff cannot derive any benefit from the attachment, as there is nothing in the possession of the garnishees out of which the judgment or any part of it could be satisfied. It is true that the seizure of any property, however small the amount may be, is sufficient to give cognizance of a cause on attachment and authorize proceedings to final judgment; that our law extends attachments to every species of property, and

all rights and credits of defendants; and that, therefore, partnership-property may be attached in a suit against one of the members of a firm as it has been done in the present instance.—4 *Martin N. S.*, 183.—But when it is shown, as in this case, that the attachment is to become a vain and useless proceeding, and is only used as an indirect mean of obtaining judgment against an absentee, who would not otherwise be amenable before our courts of justice, the right necessarily ceases, and the plaintiff must seek relief elsewhere, or in some other mode. Here, the answers of Halsey & Co. to the interrogatories propounded to them by plaintiff, and which stand uncontradicted or unexcepted to, shew conclusively that said plaintiff would vainly attempt to obtain the satisfaction of his judgment, whatever be its amount, out of the notes, specie and personal property belonging to the firm; as, in this state of the case, it cannot be pretended that said firm would not be entitled to apply the defendant's portion in their hands of the bank-notes and specie attached, to the extinguishment of the large debt which said defendant owes to said firm. If so, what effect can the attachment have, and what benefit can the plaintiff derive from it? None whatever, as he must take the answers of the garnishees as conclusive and full evidence of their having in their hands no property belonging to the defendant. We think therefore that the attachment cannot be sustained.

But it is urged that the bond given by the garnishees, ought to be taken as an appearance on the part of defendant, and considered as a waiver of the plea to the jurisdiction: we think not. The intervenors were allowed to bond the property attached on the ground that it belonged to the firm, as by them alleged in their petition of intervention; they did not act for or in the name of the defendant; and had the undoubted right of protecting and securing the property of the firm. The bond was not

EASTERN Dis.  
January, 1841.

OLIVER  
VS.  
GWIN.

Where garnishees intervene, and claim & bond the property attached, on the ground that it belongs to them, it is no appearance in court on the part of the defendant, and cannot give jurisdiction.

**EASTERN DIS.** given for the advantage of the defendant, nor with any  
**January, 1841.** view to put the property attached within his reach or in

**OLIVER**  
**vs.**  
**GWIN.**

his possession; they were perhaps aware there would be no danger in bonding it; as from their subsequent answers to interrogatories, beyond which we cannot enquire without satisfactory proof, there was sufficient evidence to show that no part of the notes and specie could be considered as belonging to said defendant; and we are satisfied that the giving of said bond by the garnishees did not destroy the right which the defendant had to shew that no property belonging to him was attached and to obtain the dismissal of the action on the ground of want of jurisdiction.

The decision of this question, which, to our astonishment appears to have been entirely disregarded by the inferior court, puts an end to the present suit, and renders unnecessary to examine the other points raised in argument and presented by the pleadings; they belong to the merits of the cause.

It is therefore ordered, adjudged and decreed, that the judgment of the Commercial Court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed that the declinatory exception filed by defendant be sustained, the attachment set aside and the suit dismissed; the plaintiff and appellant paying costs in both courts,



## CHILDRESS vs. ALLIN ET UX.

EASTERN DIS.  
January, 1841.

APPEAL FROM THE COURT OF THE 8TH DISTRICT, FOR THE PARISH OF

LIVINGSTON, THE JUDGE OF THE DISTRICT PRESIDING.

CHILDRESS  
vs.  
ALLIN ET UX.

The judgment, under which a sheriff's sale was made must be produced as the basis on which execution issued, and which is of itself *prima facie* evidence of the regularity of the previous proceedings.

So a sheriff's deed, which appears on its face to have been officially and legally made, should not be rejected when offered as evidence in support of the plaintiff's title, on the ground that the judgment on which execution issued was defective and not legally rendered.

The writ of execution and sheriff's return thereon, in ordinary cases are absolutely necessary to support a sheriff's sale; but when it is shown that they, together with the other papers of the suit, have been lost or destroyed, a copy of the naked judgment from the minutes of the court will suffice.

This is a petitory action in which the plaintiff seeks to recover a tract of 640 acres of land in the possession of the defendants. He sets up as the basis of his title, a sheriff's sale and offered in support of it, the deed of sale made by the sheriff, together with a certified copy of the judgment from the minutes of the Parish Court of Livingston, on which execution issued and under which the sale was made. The sheriff's deed is in due and legal form on its face.

There was a bill of exception taken to the admission of the judgment in evidence, on the ground that it was rendered without citation and *ex parte*; and "because it purports to make final a judgment by default, when such default never existed."

It was in proof that the suit in which this judgment was rendered had been commenced in the Parish Court of St. Helena, before the division; and during its pendency the parish was divided, and final judgment was rendered in the parish of Livingston which was taken from St. Helena.

It was further shown that the clerk was an extremely careless and dissipated man, and that all the papers of the suit, together with the execution and sheriff's return were lost or destroyed. The judgment here offered was copied from the



**EASTERN** Dis. minute or record book of the court, and is all the evidence  
**January, 1841.** of the suit that could be had. The sheriff's deed is in due

**CHILDRESS** form and recites that the sale was made in pursuance of a  
**vs.** writ of *feri facias* which issued on this judgment.  
**ALLIN ET UX.**

This case was before the Court last June Term and remanded to have this piece of evidence supplied, as it had been omitted to be embodied in the record. See 15 La. Reports 500.

And now at this term a duly certified copy of this judgment was produced as follows:

<p>"THOMAS GREEN DAVIDSON          vs.          WILLIAM &amp; STEPHEN ALLIN.</p>	}	<p>No. 4.          In this case which was transferred by an order from the Parish Court at St. Helena when judgment by default was rendered against William Allin, and Stephen Allin, on May the 26th, 1832. Judgment by default made final this day by law, and evidence being in favor of the plaintiff: It is ordered, adjudged and decreed by this Court that the plaintiff have a final judgment against Stephen Allin for the sum of one hundred dollars, the amount proven to be due to the plaintiff, with five per cent. interest from judicial demand and all costs of suit."</p>
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"Judgment signed the 12th day February,  
 A. D. 1833.

THOMAS KENNEDY,"

*P. Judge.*

The land in question was seized and sold on a writ of *feri facias* which was issued on the above judgment the 15th August, 1834, and one Robert Duncan became the purchaser for \$171, and received the sheriff's deed. Duncan sold by regular conveyance to the present plaintiff for 500 dollars in cash.

The defendants exhibited no title on the trial, except the original title by which the land was formerly owned, before the sheriff's sale, and confirmed to Wm. Allin, and by him

sold to Stephen Allin, all of which titles passed by the sheriff's sale under execution against Wm. and Stephen Allin.

EASTERN Dis.  
January, 1841.

CHILDRESS

vs.

ALLIN ET UX.

There was judgment for the plaintiff and the defendants appealed.

*Curry* for the plaintiff, submitted the case on the production of an authentic copy of the judgment of the Parish Court of Livingston, under which the land in question had been sold, and which completed the plaintiff's title. The defendants have shown no title; the judgment of the district court should therefore be affirmed.

*Hennen* for the defendant, contended that the judgment of Davidson *vs.* Allin, was improperly admitted in evidence; and relied on the bill of exceptions in the record.

2. The judgment is insufficient and defective; and without it a sheriff's sale cannot be supported. 8 Martin N. S. 175. 1 La. Reports 137.

*Simon J.* delivered the opinion of the court.

This case was before us last year, and was continued to give sufficient time to complete the record. 15 La. Rep. 500. Since then, a duly certified copy of the judgment on which the execution issued, has been procured, and now makes a part of the record. Said judgment shows that a judgment by default was regularly rendered on the 26th of May, 1832, and was made final and signed on the 12th of February, 1833.

Defendant's counsel having objected before the lower court, to the introduction in evidence of the said judgment and of the sheriff's deed of sale, on the grounds; that it was rendered without citation and *ex parte*; that it purports to make final a default which never existed; that the sheriff's sale under which the plaintiff claims was not made officially, and that no incipient pleadings ever existed or were proven; the Judge *a quo* overruled the objections, and signed a bill of excep-

EASTERN DIS. tions, which, being particularly relied on by defendant's  
January, 1841. counsel, must be first disposed of.

CHILDRESS

vs.

ALLIN ET UX.

We think the District Judge did not err. It was clearly the duty of the plaintiff, in order to make out his case, to produce the judgment which was the basis of the execution under which he claims title to the property in dispute, and we cannot see any reasonable objection to it. This court has often held that a sheriff's deed could not pass the property of the defendant in execution, unless supported by a judgment. 8 *Martin N. S.* 162, 179—and that he who claims under a sale made by virtue of a writ of *feri facias*, is only bound to produce the judgment on which it issued, and cannot be required to produce any other part of the record. 6 *Idem* 462—3 *La. Rep.* 212—4 *Idem* 12—such judgment is *prima facie* evidence of the regularity of the previous proceedings or *incipient pleadings*, and it is the duty of the party complaining of irregularities in such previous proceedings, or attacking the sale as illegal, to shew in what they may consist. With regard to the sheriff's deed, we are unable to perceive the bearing of the objection; it appears on its face to have been officially and legally made; it is in due form; and we see no reason why it should have been rejected.

So a sheriff's deed, which appears on its face to have been officially and legally made, should not be rejected when offered as evidence in support of the plaintiff's title, on the ground that the judgment on which execution issued was defective and not legally rendered.

On the merits, we are of opinion that the plaintiff has sufficiently made out his case, and that he is entitled to recover the property described in his petition. It is however true that he has failed to produce the writ of execution and sheriff's return which, in ordinary cases, are absolutely required to support a sheriff's sale, but from the evidence by him adduced to supply the absence of this document, he has shewn, and we think, conclusively, that such writ of execution once existed, and that owing to certain circumstances clearly proven and over which he had no control, it has been lost or destroyed together with the other papers of the suit. If the records of a court of justice be lost or destroyed, we will suffice.

are not ready to say that, after their existence and loss are established, the party should not be allowed to resort to the next best evidence which the nature of the case is susceptible of, and that it should not be received; and if written copies of them do not exist, their contents may, if necessary, be established by parol testimony. This the plaintiff has done so far as it could be required of him; he has shown by the then acting sheriff that the execution under which the sale was made, was, after said sale, duly returned to the clerk, and the deed of sale recites the writ and the suit in which it was issued, and considering therefore the proof of the existence of the writ and its subsequent loss as sufficiently established, we feel bound to give to these facts the same force and effect as if the execution itself was before us; and we come the more readily to this conclusion that the defendants have not in any part of their answer, pointed out any informality in the proceedings which would in any way give us any ground to suspect their validity.—It is now a well settled doctrine in our jurisprudence, in relation to sales under execution, that “when a purchaser shows a judgment, writ of execution and sale to him under them, made by the proper officer, all previous proceedings by the latter must be presumed to have been correctly made,” and that presumption *omnia rectà acta* will exist until the contrary be shown. 9 L. R. 542.—In this case, the defendants have not even attempted to allege any informality in any part of the proceedings previous to the deed of sale; they based their defence upon entirely different grounds which are unsupported by the evidence.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

EASTERN DIS.  
January, 1841.

GAIENNIE *vs.* AKIN'S Executor ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

GAIENNIE  
vs.  
AKIN'S EXECU-  
TOR ET AL.

While a commercial partnership is in existence, service of citation on one of the members of the firm is good against all of them; but after its dissolution every member intended to be sued and made a party must be served with citation separately.

The liquidator of a partnership has no authority to stand in judgment for the other partners or members of the firm, unless a special power be given to that effect.

The Louisiana Code requires express and special power to be given whenever the things to be done are not merely acts of administration.

So where the partners of a commercial firm were sued after the dissolution of the partnership and one only was cited, who appeared and put in an answer for himself: *Held* that the judgment was null and void as to the other who was not separately cited.

This is an action of nullity and to stay an execution, which had issued on a judgment obtained by Oliver Akin in his lifetime against Gaiennié and Deneufbourg, after the dissolution of their partnership.

The present plaintiff, Gaiennié, alleges that he had not been cited in said suit and was ignorant of it until after judgment rendered; that said judgment is a nullity, as regards him; having been rendered after dissolution of the partnership and without notice or citation having been served on him.

He further shows in a supplemental petition that Deneufbourg on pretence of having paid said judgment and being subrogated to Akin's rights therein, has taken out a *capias* for one-half the amount, against him (plaintiff). He prays for injunction to stay all proceedings against him on, or in consequence of said judgment, on the ground that it is a nullity as respects him and that it be declared null.

The defendant, Deneufbourg, appeared by counsel and filed exceptions to the plaintiff's petition; and averred that Gaiennié was properly cited in the suit of Akin, by the name of the partnership as he (defendant) was liquidator of the concern.

2. Service of citation was made on him, defendant, in person as the liquidator of the firm, which was sufficient notice to all of the members.

3. That Gaiennié had full and repeated notice of the pendency of the suit, in which judgment was rendered against them.

EASTERN DIS.  
January, 1841.  
GAIENNIÉ  
VS.  
AKIN'S EXECU-  
TOR ET AL.

It was admitted Deneufbourg was the liquidator of the firm, and that citation was alone served on him. He appeared and put in an answer defending himself alone, and throwing the burthen of the suit on his co-partner, on the ground that the debt enured to his benefit.

There was judgment sustaining the exceptions, and against the plaintiff; dissolving the injunction with damages, interest and costs, and he appealed.

*C. Janin*, for the plaintiff and appellant contended, that the judgment should be reversed.

1. Because no citation was served on Gaiennié in the suit of Oliver Akin *vs.* Gaiennié and Deneufbourg, instituted after dissolution of their partnership, in which suit a judgment was rendered and it forms the object of this action of nullity. Code of Pr. art. 606.

2. Because a member of a firm, merely charged with the liquidation of the partnership affairs, is not, by virtue of such a mandate, empowered to appear in court, and defend suit for the other member: *Peters and Millard et al. vs. Gardère, syndic.* 8 La. Rep. 565.

3. Because, should such a mandate contain the power of appearing in court, it is in evidence that the liquidator did not act in that capacity and made a separate answer incompatible with the exercise of such a mandate.

*Canon*, contra insisted on the affirmance of the judgment.

*Morphy J.* delivered the opinion of the court.



EASTERN DIS.  
January, 1841.

GAIENNIÉ  
VS.  
AKIN'S EXECU-  
TOR ET AL.

This action is brought to annul a judgment obtained by one Oliver Akin against plaintiff, as a member of the firm of "Gaiennié & Deneufbourg," on the ground that no citation had been served on him, the plaintiff; that the partnership of which he had been a member had been dissolved by mutual consent several months before the institution of the suit; that public notice of such dissolution had been given in the public papers, and that the plaintiff in that suit had had direct notice thereof by the separate answer which Deneufbourg had filed long previous to the rendition of the judgment sought to be avoided. Plaintiff sued out an injunction to arrest the execution of a *feri facias* against him under such judgment. On the very day the present suit was brought, Deneufbourg having satisfied the judge below that he had paid up the amount of said judgment, and was, by such payment, subrogated to the rights of Akin under it, he was allowed to take out against the plaintiff a *capias ad satisfaciendum* for one-half of the judgment and costs; but this writ was also enjoined on the grounds already stated. The defence set up was that the citation served upon Deneufbourg one of the partners of the old firm was good or binding on plaintiff, because at the dissolution of the partnership, Deneufbourg had been charged with the liquidation of the accounts. The court below dissolved the injunctions previously granted and decreed damages against the plaintiff and his surety on the injunction bond.

While a commercial partnership is in existence, service of citation on one of the members of the firm is good against all of them; but after its dissolution every member intended to be sued and made a party must be served with citation separately.

We think the court erred; it is true that during the existence of a commercial partnership, service of citation on one of the members is good against all of them, but after its dissolution, every member intended to be made a party to a suit must be served with a separate citation. The general power given to one partner to settle and liquidate the accounts of the partnership does not appear to us to confer on him greater rights than each member of the firm after its dis-

solution could have possessed for the purpose of liquidation, had no liquidator been appointed. It relates to the payment of acknowledged debts and the collection of all sums due to the firm, but does not enable the liquidator to stand in judgment for the other partners unless a special power to that effect be granted. Our Code requires express and special power to be given whenever the things to be done are not merely acts of administration. La. Code art. 2966—8 La. Rep. 568—13 *Idem* 484. But even could the general power to settle all accounts be considered as sufficient to enable Deneufbourg to defend a suit brought against his former partner, the record shows that he was not sued as liquidator of the partnership; and that he did not appear in the suit in that capacity, he appeared and filed for himself a separate answer tending to throw the burthen of the whole debt on his late partner Gaiennié, on the ground that the draft sued on had never been accepted for the good of the firm; but had been accepted by Gaiennié for his own private use and benefit, without his (Deneufbourg's) knowledge and in fraud of his rights. After such an answer, Gaiennié could not be considered as represented in the suit or as legally cited. No judgment by default could be taken against him, without a separate citation being first served upon him according to law; this not having been done, all the proceedings in the suit were as to him absolutely null and void. Code of Pr. art. 206 and 606.

It is therefore ordered and adjudged, that the judgment of the District Court be reversed; that the injunctions sued out by plaintiff be made perpetual, and that the appellee pay costs in both courts.

EASTERN DIS.  
January, 1841.

GAIENNIÉ  
VS.  
AKIN'S EXECU-  
TOR ET AL.

The liquidator of a partnership has no authority to stand in judgment for the other partners or members of the firm, unless a special power be given to that effect.

The Louisiana Code requires express and special power to be given whenever the things to be done are not merely acts of administration.

So where the partners of a commercial firm were sued after the dissolution of the partnership and one only was cited, who appeared and put in an answer for himself: *Held* that the judgment was null and void as to the other who was not separately cited.

EASTERN DIS.  
January, 1841.

MILNE'S Heirs *vs.* MILNE'S Executors.

MILNE'S HEIRS  
*vs.*  
MILNE'S  
EXECUTORS.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF  
NEW-ORLEANS.

It is necessary to enable a legatee to take under our laws, that he be in *existence* at the time of opening the estate, and have capacity to *receive* if the legacy be absolute; but if it is conditional, it is sufficient if the capacity to receive exist at the time of the fulfilment of the condition.

Where legacies were given by the late Julien Poydras to the parishes of Pointe Coupée and West Baton Rouge for particular specified objects, the legacies were absolute, but there was no capacity in the legatees to take at the moment of opening the succession, and laws were passed, authorising the police juries of those parishes to accept the legacies for the objects named.

So where legacies were left to two Asylums for destitute orphan boys, and destitute orphan girls, with directions to the executors to cause the same to be duly incorporated. Held, that these dispositions were conditional, and as soon as the condition was fulfilled by incorporating those asylums, the capacity to take the legacies was then created.

The direction of the testator to his executors to establish the asylums mentioned in the Will, and hand over the legacies to them when incorporated, is not in violation of the provision of the Code which declares that substitutions and *fidei commissa* are abolished.

The object of abolishing substitutions, &c. was to prevent property from being tied up in the hands of individuals, and placed out of commerce, but it was never contemplated to abolish naked trusts which were to be executed immediately.

This case comes before the court on an opposition made by the heirs at law to the application of the executors of Alexander Milne, deceased, for the homologation of their account of administration of his estate.

On the 9th November, 1839, the executors filed their account and prayed that it be homologated.

The attorney appointed to represent the absent heirs came forward and filed an opposition to said account, on behalf of the absent heirs and next of kin of the deceased, objecting to all the items of expenditure in the account made for the erection and establishment of the "Milne asylums for destitute orphan girls and destitute orphan boys," and opposed their homologation on the grounds that these institutions not

being in existence at the death of the testator and when his succession was opened, they have no capacity to take any legacy or bequest under said Will; but that these opponents acquired a vested right as heirs at law and next of kin to all such parts and portions of said succession as may have lapsed or fallen for want of capacity to take in all or any of the particular legatees, or of the legatees under a universal title. In this opposition the following clause of the Will is attacked.

EASTERN DIS.  
January, 1841.  
MILNE'S HEIRS  
vs.  
MILNE'S  
EXECUTORS.

"It is my positive Will and intention that an asylum for destitute orphan boys, and another for destitute orphan girls, shall be established at Milneburg, in this parish, (of Orleans) under the name of the "Milneburg Asylum for destitute orphan boys," and the "Milneburg Asylum for destitute orphan girls;" and that my executors shall cause the same to be duly incorporated by the proper authorities of this state; and to the said contemplated institutions, &c. I give and bequeath in equal shares or interest of one-fourth to each, of all my lands on the Bayou St. John and on the Lake Pontchartrain, including the unsold lands of Milneburg. I institute for my universal heirs and legatees in equal shares or portions, the said institutions, that is to say, the *two, intended institutions at Milneburg*, to whom (with two other asylums) I give and bequeath all the *residue* of all the property and estate, moveable and immoveable I may possess at the time of my decease, to be equally divided and apportioned among them."

On the application of the executors, the Legislature of Louisiana, passed two acts of incorporation, the 27th February, 1839, incorporating two institutions by the style or name mentioned in the Will, and giving to each "the general powers belonging to corporations, and all special powers where by law a special power is required to do an act; provided that all their acts shall be for the benefit of said institutions."

**EASTERN DIS.**  
**January, 1841.**

**MILNE'S HEIRS**  
**VS.**  
**MILNE'S**  
**EXECUTORS.**

These institutions have been organized and administrators or directors appointed to conduct them. They claim the bequests under the provisions of said Will. The executors allowed them and have expended money for the buildings necessary, all of which items of expense are opposed by the heirs, who claim these bequests as lapsed legacies for want of capacity to take; these institutions not being in existence at the time of the opening the succession.

There was judgment dismissing the opposition and the opponents appealed.

*Hoffman and Strawbridge* for the appellants, contended that the law expressly required in all bequests, legacies or donations *inter vivos et mortis causâ*, that the legatees or donees should be in existence and capable of taking or receiving the legacy at the moment of the opening of the succession or death of the testator; in case of donations *inter vivos* the donee must have the *capacity* to take when the donation is excepted; he must be in existence. La. Code 944, 947, 948, 949, 1459, 1469 and 1478.

2. All legacies or donations *mortis causâ* given in trust to be held for persons incapable of receiving, or not in existence at the time are substitutions and *fidei commissum*, which are prohibited by law. *Idem* 1507, 1598, 1690, 1696. 5 Toulier, p. 100, No. 2.

3. It is assumed as indisputable that corporations are entitled to equal rights with natural persons, but cannot be greater, even though they be charitable or benevolent in their object. The law knows no distinction, and in all cases the corporation or person in order to be capable of taking a legacy must be *in existence* at the time of the death of the testator. Suppose the legacy to have been given to a Bank *to be hereafter* created under the title to the Milneburg Banking Company, and the executors charged with having it incorporated; or given to the eldest son of A B, who has

no son, could the Bank, not in existence, or the son of A B EASTERN Dis. not born or conceived, at the death of the testator, take the January, 1841. legacy, supposing the Bank to be incorporated, or the son MILNE'S HEIRS vs. MILNE'S EXECUTORS. born seven years after the testator had died? And yet such is the construction contended for that they can take at whatever time they come into existence:

4. The maxim "*la mort saisit le vif*," that the transmission of a succession is instantaneous, though unknown to the heirs; that the property or legacy cannot remain in obedience, appears to be overthrown by the doctrine advocated by the defendant, and a wide door opened for the evasion of those laws, restrictive of the right of locking up property and creating perpetuities. These are not technical objections drawn from provisions of law, perhaps not applicable to the case. They are drawn from a settled policy, discussed and determined upon by the redactors and revisors of our Code, and fundamental provisions.

5. The first qualification of a legatee then is to exist at the time of the testator's death. Did these Asylums then exist? This is not pretended; neither is it urged that if they had never been incorporated that the legacies would not have lapsed and fallen. If they were not now in existence by subsequent creation, not even this suit would have existed. There is no condition annexed to these legacies as is contended. The testator states that "it is his *positive* Will and intention, that the orphan asylums shall be established;" and to these two contemplated institutions, &c., "I give and bequeath, &c." It does not seem as if any condition is expressed, then there can be no legacy given on the happening of a condition, when no condition exists. But is considered that existence of the legatee is necessary to take even conditionally. 5 Toullier No. 92. 4 *Idem* No. 91. 9 Duranton No. 311. 6 *Idem* No. 67. Delvincourt 718—Note to page 230. N. P. Code art. 906.



EASTERN DIS.  
January, 1841.

MILNE'S HEIRS  
VS.  
MILNE'S  
EXECUTORS.

6. Pothier on testaments, chapter 3, sec. 2, art. 1, under the title of absolute incapacities, declares that corporations *not authorised at the time* of making the Will, cannot take as legatees; although *authorised at the testator's decease*. This rule is however changed by our Code, which refers the *capacity* to take, to the time of his death.

7. Will it be for a moment contended that a donation, null in itself, can by acceptance be made valid. The case of the bequest to the son of A B unborn, is an example to show its impossibility. Would the acceptance by the parent render the bequest good? Certainly not. Argument appears useless to show that before the acceptance, there must be a valid bequest; a person for whom it can be accepted. Here there was no person in existence, in whom the legacies could vest between October, 1838, when Milne died, and February, 1839, when these corporations were created. In whom did these legacies vest *eo instanti* at Milne's death? Who was *le vif que la mort saisit*? are questions more easily asked than answered?

*Preston*, for the defendants, contended that he should take it for granted that the court would encourage the freest possible disposition by men of the property acquired by their industry, which is not prohibited by law. That since the Legislature had incorporated and established the Asylums in question, it must be taken as an expression of the approbation of that body of these bequests and of the validity of the testamentary dispositions in their favor.

2. The provisions of the Code so strongly relied on in the oppositions to these legacies by the plaintiffs evidently relate to *natural persons*, as the very spirit and even letter of the articles cited show. See La. Code art. 944, 947, 1459, 1478, 1469 and 1696.

3. The cases in which legacies lapse or fall because the legatees are not in existence, are cases in which the testator supposes the legatees in existence, when in fact they are not,

and he dies in this ignorance. In such cases the legacies are given in error and their execution becomes impossible. In case of the incapacity, or unworthiness of legatees the legacy lapses or falls because in direct contravention of law, and so of legacies reprobated by law.

EASTERN DIS.  
January, 1841.  
MILNE'S HEIRS  
VS.  
MILNE'S  
EXECUTORS.

4. The legacies in question were not made to natural persons or corporations incapable of taking in consequence of which they lapsed, and therefore the rules applicable to them have no bearing on this case. These legacies are given to institutions to be established capable of taking; for the very purpose of establishing them and providing for their support. This is not prohibited by law, but on the contrary results by implication from several articles of the Code. La. Code 608, 870, 1563—4.

5. The condition of these donations or legacies, was the establishment of the two asylums, which was fulfilled on the incorporation of them; and when the donation depends on the fulfilment of a condition, it is sufficient if the donee is *capable of taking* or receiving the legacy or donation at the *moment the condition* is accomplished. La. Code art. 1460, 1465, 1459, 1536.

6. The testator may make any disposition which the laws do not prohibit. Any thing that can be done and which it is reasonable to do, certainly the testator can direct to be done and the executor must see it is done. The testator may direct a useful act to be done by his executor or heir; the counsel for the opponents contends that he cannot. Would it be useful for a testator to direct a tomb to be erected over his body, or mass to be said for his soul; if so he may direct a church to be built or an asylum to be established with provision or a legacy for its support.

7. It is urged that an executory devise cannot be made in Louisiana. We say nothing prohibits it. An executory devise of lands is such a disposition of them by Will that thereby no estate vests at the death of the *devisor*, but only on some

**EASTERN DIS.** future *contingency*. 2 Blackstone Com. 172—3. This can  
**January, 1841.** be done in Louisiana, and it is a most useful and necessary  
**MILNE'S HEIRS** disposition and power over property. Its exercise conflicts  
**VS.** with no law, and in this state is eminently useful as it prevents  
**MILNE'S** large successions from being abstracted from the country by  
**EXECUTORS.** cousins and other remote kin of a testator who had left their  
 country for half a century.

8. It is said the direction by the testator to his executors to establish asylums is prohibited by the 1507 article of the Code reprobating substitutions and forbidding *fidei commissa*, as they are prohibited.—“This article says that every disposition by which the donee, the heir or legatee is charged to preserve for or to return a thing to a third person is null, &c.” Then every disposition of a Will where the executor has the seisin is prohibited by this article, for he is directed to preserve it and hand it over to the legatee, donee, &c.

*Morphy J.* delivered the opinion of the Court.

The question presented for our decision in this case arises out of a clause in the last will and testament of the late Alexander Milne; it is in the following words, to wit:

“It is my positive will and intention that an asylum for destitute orphan boys, and another asylum for the relief of destitute orphan girls, shall be established at Milneburg, in this parish, under the names of the Milne Asylum for destitute orphan boys, and Milne Asylum for destitute orphan girls, and that my executors shall cause the same to be duly incorporated by the proper authorities of this state; and to the said two contemplated institutions and to the present institution of the Society for the relief of destitute orphan boys in the City of Lafayette and parish of Jefferson, in this state; and to the Poydras female asylum in this City, I give and bequeath in *equal shares or interests*, of one-fourth to each, all my lands on the bayou St. John, and on the lake Pontchartrain; including the unsold lands of Milneburg.

I institute for my universal heirs and legatees in equal shares or portions the said four institutions, that is to say: the *two intended institutions* at Milneburg, and the two asylums aforesaid in this City, and in the City of Lafayette, to whom I give and bequeath the *residue* of all the property and estate, moveable and immoveable, I may possess at the time of my decease, to be equally divided and apportioned among them."

EASTERN DIS.  
January, 1841.

MILNE'S HEIRS  
VS.  
MILNE'S  
EXECUTORS.

The testator died in October, 1838, and in February following the general assembly of this state wishing to enable the executors to carry into full effect his beneficent intentions, incorporated the two asylums mentioned in the will. When the executors filed their account, the absent heirs of the deceased, through the attorney appointed to represent them, opposed all such disbursements as had been made for establishing or maintaining the two institutions at Milneburg, on the ground that said disbursements were made by the executors without authority, and in their own wrong. They averred that the two incorporated asylums had acquired no right, title or interest, in or to the said succession, or any part of it; that at the death of the late A. Milne they were not *in esse*, and had no capacity to take under his will; that at the opening of the succession, the heirs at law and next of kin of the deceased, acquired a vested right to all such parts or portions of said estate, as had lapsed or fallen, for want of capacity to take in any or all of the particular legatees, or legatees under a universal title, or from any other cause; and that the executors had full notice of the incapacity of these institutions to take because an application previously made by them to be recognized as universal legatees, and put in possession of their respective positions, had been proposed on the same grounds. The court below dismissed the opposition so far as it contested the capacity of the Milne asylums to receive their bequests. The heirs at law appealed.

They rest their objections to the validity of these bequests, on all these articles of the Louisiana Code which declare a

**EASTERN DIS.** legacy to be void if the legatee be not in *existence*, or be *incapable of receiving it, at the opening* of a succession. La. *January, 1841.*

**MILNE'S HEIRS** Code art. 944, 947, 948, 949, 1459, 1469, 1478, 1598, 1690, *vs.* 1696. They contend that as these two institutions had no legal existence at the time of the death of the testator, they could not take under his will; that the nearest legitimate heirs became immediately entitled by law to these legacies, and that their title to the same being thus vested, could not be destroyed by the subsequent acts of incorporation obtained from the general assembly. This question does not present itself to us surrounded by those difficulties which would attend its solution in those states whose statutes of wills exclude corporations as competent devisees. The statutes of mortmain and the reasons which produced them do not exist among us; and corporations are placed by our laws on the same footing as natural persons, as to their capacity to take by devise.

It is necessary to enable a legatee to take under our laws, that he be in *existence* at the time of opening the estate, and have capacity to receive if the legacy be absolute, but if it is conditional, it is sufficient if the capacity to receive exist at the time of the fulfilment of the condition.

Two things must concur to enable a legatee to take under our laws; 1st. He must be in existence at the time of the opening of the estate; 2d. He must have capacity to receive at that time, if the legacy be absolute; if it be conditional, it is sufficient if the capacity to receive exists at the time of the fulfilment of the condition. La. Code art. 1460. 5 Toullier, p. 99, No. 91. Pothier des donations testamentaires p. 361, and traité des oblig. Nos. 203, 208 & 222.

It is in general true that the person of a legatee must be designated in terms not to be mistaken; if the designation is so vague and indefinite that the intention of the testator cannot be ascertained the legacy falls, for want of sufficient certainty. But this precision is required only as to individuals in regard to whom the will cannot be executed if their identity cannot be established; when a legacy is made to a certain class or collection of persons and is not dictated by caprice but by charitable and meritorious motives, although the individuals are unknown to the testator, such a legacy will not under our

laws be considered void for uncertainty. Pothier des testaments chap. 1, art. 5.—Domat, Lois Civiles, Book 4, c. 11, sect. 6, § 4 & 5. Our Code art. 1536 provides that "donations made for the benefit of an hospital, *the poor of a community or of establishments of public utility*, shall be accepted by the administrators of such community or establishments." In the Napoleon Code which contains provisions similar to ours as to the necessity of a legatee being in existence at the death of the testator, we find an enactment recognising the validity of such donations but providing that they shall not be carried into effect unless approved of by the government, N. C. art. 910. Such donations are there made conditional; the capacity to receive is made to depend on the fulfilment of a condition, to wit: the sanction of the sovereign; until that is obtained, the poor or other class of persons intended to be benefitted are without capacity to receive. Had the deceased made a legacy to the destitute orphans of this parish without providing that they should be incorporated, the question would have presented itself whether under article 1536, above quoted, the police jury of the parish would not have been competent to accept it on behalf of the intended objects of his benevolence. There appearing to be some doubt on this subject, we have seen, on former occasions of this kind, the general assembly of the state acting as the *parens patriæ* in the carrying into effect charitable dispositions in the wills of public benefactors. 2 Moreau's Dig. p. 208; laws of 1837, p. 24. They authorised the acceptance by the police juries of Pointe Coupée and West Baton Rouge of three legacies, by the late Julien Poydras, two of \$30,000 to each parish, to be appropriated as dowries to the young ladies of the parishes to encourage their marriages, and one of \$20,000 to be appropriated to the maintenance of an academy in the parish of Pointe Coupée. In the will of Poydras the legacies were absolute and the difficulty laid in the absence of any capacity in the legatees to take at the moment of the opening of the

EASTERN DIS.  
January, 1841.

MILNE'S HEIRS  
VS.  
MILNE'S  
EXECUTORS.

Where legacies were given by the late Julien Poydras to the parishes of Pointe Coupée and West Baton Rouge for particular specified objects, the legacies were absolute, but there was no capacity in the legatees to take at the moment of opening the succession, & laws were passed, authorising the police juries of those parishes to accept the legacies for the objects named.



**EASTERN Dis.** succession. In the case under consideration, the testator appears to have been aware that unless incorporated the two  
*January, 1841.*

**MILNE'S HEIRS**  
**vs.**  
**MILNE'S**  
**EXECUTORS.**

asylums had no capacity to receive, and to have intended that his dispositions in their behalf should not be carried into effect until after their incorporation. This intention is not expressed in positive terms but can and must, we think, be fairly inferred from the wording of the will. The Roman law informs us that one who is incapable may be instituted as heir, for the time when his incapacity shall cease. "In tempus capiendæ hereditatis institui heredem posse benevolentiæ est." Veluti, *Lucius Titius, Cum Capere potuerit, heres esto: idem et in legato.* B. 28. T. 5. Law 62, de insti. hered. 5 Toullier p. 99, No. 91. Dispositions of this kind are conditional in their nature and the condition is fulfilled by the creation of the capacities to receive: thus in this case, it was intended, we think, that the legacies should be delivered to these institutions upon their becoming incorporated; the implied condition was that they should be rendered capable of receiving and that condition was fulfilled by the subsequent acts of incorporation. Somewhat analogous are the cases of a legacy to a *feme sole* upon her marriage, or to an infant in *ventre sa mère*, the marriage or the birth which fulfils the condition creates the capacity to receive which did not exist at the time of the opening of the succession.

So where legacies were left to two Asylums for destitute orphan boys, and destitute orphan girls, with directions to the executors to cause the same to be duly incorporated. Held that these dispositions were conditional and as soon as the condition was fulfilled by incorporating those asylums, the capacity to take the legacies was then created.

But to take a less limited view of this matter, must not every disposition in a man's will not reprobated by law, be carried into effect? such is the rule universally laid down for the construction of wills. Here a testator who has acquired his wealth in this country and has no forced heirs wishes to create with the aid of the Legislature two institutions of manifest public utility; as soon as this desire of the deceased is made known to the general assembly, they grant the necessary acts of incorporation and the executors discharge the trust committed to them. We can see nothing in the law to prevent this being done. After the strong and positive decla-

ration of Milne with respect to the disposition of his property, shall a technical objection drawn from provisions of law, not perhaps applicable to cases of this kind, defeat his purpose? nothing short of an express prohibition in the law should, we think, have such an effect. It is supposed that the direction of the deceased to his executors to establish these asylums and hand over to them a part of his estate is a violation of article 1507 of our code, which declares that substitutions and *fidei commissa*, are abolished. In the language of this court in Mathurin *vs.* Livaudais, 5 *Martin's N. S.*, 302; "the object of this change in our jurisprudence was to prevent property from being tied up for a length of time in the hands of individuals, and placed out of the reach of commerce. The framers of our code certainly never contemplated to abolish naked trusts, uncoupled with an interest which were to be executed immediately. If they had, they would not have specially provided in a subsequent part of the work for testamentary executors, described their duties and recognized the validity of their acts." Here in the discharge of their trust the executors were to apply to the Legislature to have the asylums incorporated, and as soon as this was done, they were forthwith to deliver, and did deliver over to them the bequest made in their behalf. In this we can see no substitution or *fidei commissum*; it is nothing more than a conditional disposition. The case of the Baptist Association *vs.* Hart's executors, 4 *Wheaton*, p. 27, has been pressed upon us as having a strong bearing upon the present. There the bequest was "*To the Baptist Association that for ordinary meets at Philadelphia.*" It was an absolute devise to take effect on the death of the testator. The association described not being incorporated was incapable of executing the trust. The individuals composing it could not take the bequest because no private advantage was intended for them, and the will of the deceased did not contemplate the event of the association becoming a body corporate. The court considered that the bequest was gone for uncertainty

EASTERN DIS.  
January, 1841.

MILNE'S HEIRS  
vs.  
MILNE'S  
EXECUTORS.

The direction of the testator to his executors to establish the asylums mentioned in the will, and hand over the legacies to them when incorporated is not in violation of the provisions of the Code, which declares that substitutions and *fidei commissa* are abolished.

The object of abolishing substitutions, &c. was to prevent property from being tied up in the hands of individuals, and placed out of commerce, but it was never contemplated to abolish naked trusts which were to be executed immediately.

EASTERN DIS.  
January, 1841.

MILNE'S HEIRS  
vs.  
MILNE'S  
EXECUTORS.

as to the devisees; no one having capacity to take at the death of the testator. More analogous to the present case is that reported in 3d Peters, 112; the object of the devise was to build an asylum to be called "*The Sailor's Snug Harbour*," for the purpose of maintaining and supporting aged, decrepid and worn out sailors. It was held that a devise to a corporation to be created by the Legislature, composed of several officers, designated in the will as trustees, was valid, and this decision was made after considerable research and deliberation, growing out of a division of opinion in the court. Judge Story, who delivered in the case a dissenting opinion, rests it on grounds, not incompatible with the views we have expressed. He says, page 147, "But the difficulty is in arriving at the conclusion upon the terms of the will, that the testator did mean any devise to them (the officers) in their private capacities, It is manifest from his language that he did not devise to the then Chancellor, Mayor and Recorder, &c., in their private capacities, because the language is that it is to the Chancellor, &c. &c., *for the time being, and their respective successors in the said offices for ever*. It is then a devise to them as officers, during their continuance in office, and the estate is to go to their successors in office *for ever*; so that none of the devisees are to take any certain estate to themselves, but only while they continue in office." "His intention is clearly that the charity shall be a perpetuity. He devises to the successors in office *for ever*. They are to be the administrators of the charity for ever. Upon what ground can the court exclude the successors from the administration of the charity, when the testator has so designated them? Why may we not equally well exclude the present incumbents as the future? Both are named in the will; both are equally, in the view of the testator, of equal regard." In another place, page 149, he says, "If the devise was void at law at the time it was to have effect, to wit: at the death of the testator, the subsequent act of the Legislature of New York, could not have any effect to divest the

vested legal title of the heirs of the testator. The devise was not a devise to a corporation not *in esse* and to be created *in futuro*. It was a devise *in presenti* to persons who should be officers at the death of the testator, and to their successors in office. The vesting of the devise was not to be postponed to a future time, until a corporation could be created. It was to take immediate effect, and if the trustees could not exercise their powers in the manner prescribed by the testator, they were to apply to the Legislature for an act of incorporation. Assuming, then, that a devise *per verba de futuro*, to a corporation not *in esse*, which is to take effect when the corporation should be created would be good, and vest, by way of executory devise, in the corporation when created, as seems to have been Lord Chief Justice Wilmot's opinion; it is a sufficient answer that such is not the present case." Thus it is seen that the dissent of this learned Judge proceeded on the ground that the will of the testator was not complied with by confiding the management of the trust to the corporation created by the Legislature of New York, to the exclusion of the successors in office of the officers designated in the will; but no opinion is expressed against the validity of a devise to a body corporate to be created subsequently to the death of a testator. But without adverting to a number of decisions made in England and in our sister States, under the doctrine of charities, which has grown up from the civil law, we must determine this controversy by the provisions of our own statutes, and in them we find nothing which makes it our duty to reverse the judgment under review.

It is therefore ordered and adjudged that the judgment of the Court of Probates be affirmed with costs.

EASTERN DIS.  
January, 1841.

MILNE'S HEIRS  
VS.  
MILNE'S  
EXECUTORS.

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EASTERN DIS.  
January, 1841.

DUPUY vs. DASHIELL.

DUPUY  
vs.  
DASHIELL.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT FOR THE PARISH OF  
IBERVILLE, THE JUDGE THEREOF PRESIDING.

The renewal of the registry of a mortgage after the lapse of ten years from the recording, cannot avail the mortgagee against an ordinary third possessor or subsequent mortgagees.

But where a subsequent purchaser *assumes* the payment of the *mortgage debts* due the original vendor, he cannot avail himself of the want of re-inscription of the original mortgage within the ten years.

Where the subsequent purchaser assumes the mortgage debts of his vendor to the original seller, with a clause that the "plantation and slaves remain specially mortgaged to secure their payment" it has the effect of giving a new right of mortgage to the original vendor.

The subsequent purchaser and third possessor who assumes the debts of his vendor, can also avail himself and plead any payments the vendor may have made and not allowed.

This is an hypothecary action against a plantation and certain slaves in the possession of the defendant, as a subsequent or third purchaser.

The plaintiff, who is the widow of Marcel Dupuy, shows that in 1828, her husband sold a plantation and nine slaves to Timoleon Lessassier for the price and sum of \$13,200, payable in March, 1829; but it is stipulated that if \$2200 is paid at that time, that for the remaining \$11,000, the purchaser may delay payment from year to year on paying ten per cent. interest per annum; and he consents to a mortgage on the land until complete payment. In 1836, T. Lessassier sold this plantation, which had been augmented from five to eleven arpents front, &c., with about forty slaves, including those purchased of Dupuy, to Addison Dashiell, the present defendant, who assumed the payments due and unpaid by Lessassier to his vendor, which were to be deducted from the first instalments. The price stipulated by Dashiell to be paid for the entire plantation and slaves, was \$60,000, payable in five equal instalments of \$12,000 each, the first payable as soon as the renunciation

of the vendor's wife could be obtained, and the four others in one, two, three and four years from the day of sale. EASTERN DIS.  
January, 1841.

The purchaser assumed the payment of all the mortgage claims previously existing on the land and slaves; among other's the plaintiff's. The plaintiff prays judgment against Dashiell for the amount of her demand, to wit, \$13,000 and *interest*, and that the land and slaves be seized and sold under the original mortgage retained by her husband in 1828.

DUPUY  
vs.  
DASHIELL.

The defendant pleads prescription against the mortgage under which the plaintiff claims, because it was not re-inscribed until after the expiration of ten years from its date. The plea of payment is interposed, and various items and payments are specified as having been made by Lessassier to Dupuy, on account of this debt, and not credited. Dupuy's mortgage was first inscribed the 13th March, 1828, and not re-inscribed until the 9th March, 1839.

The cause was submitted to a jury on the evidence and vouchers produced showing the payments relied on; and on the question of the re-inscription of the mortgage.

The defendants counsel moved the Court to charge the jury against the mortgage, that it was annulled for want of re-inscription within the legal delay. 2. That the act of sale from Lessassier to Dashiell is not a renewal, or re-inscription of the mortgage from Lessassier to Dupuy. 4. That Dashiell did not consent to any mortgage upon the property in favor of Dupuy. And 5. The plaintiff has no mortgage against the plantation and slaves sold by Dupuy.

The court declined to give the charge as requested; but charged in substance that there is a clause in the act of sale from Lessassier to Dashiell, in which the latter stipulates that the "plantation and slaves are to remain specially mortgaged to secure the payment of the four last instalments and obligations, a part of which by his own



EASTERN Dis. stipulations was made payable to the mortgage creditors of January, 1841.

DUPUY  
vs.  
DASHIELL.

Lessassier (and among them the original vendor, Dupuy,) and the balance was represented by notes, which he calls obligations to Lessassier himself. That this clause had the effect of giving a *new right of mortgage* to Dupuy, &c., for the security of the sums due by Lessassier, on the property, &c.

The defendant's counsel excepted to the opinion of the court, both as to the charge given and that refused to be given.

There was a verdict and judgment in favor of the plaintiff for the sum of \$11,640, with interest at ten per cent, &c. The defendant appealed.

*Hiriart & Burke* submitted written points insisting on the affirmance of the judgment.

The prescription pleaded was interrupted by the acknowledgment of the debt both by Dashiell and his vendor, Lessassier, vide act 8th March, 1836, or rather that acknowledgment is not so much a renunciation of a right not yet acquired, as a renewal of the obligation and mortgage, and by consequence the prescription runs only from the acknowledgment.—3 *La. Rep.* 263. The act of 8th March, 1836, is an acknowledgment by Dashiell and Lessassier of the debt and mortgage, and an amount, a supposed equivalent to the debt, is left retained in the hands of Dashiell, the purchaser, to discharge it. He, Dashiell, has made a stipulation in favor of third persons, in our favor of a debt and mortgage.

*Winchester & Ives* for the defendant—

1. The decree of privilege against the land and slaves is erroneous, because mortgage was prescribed.—*La. Code*, 3333.—*Sirey, Code Annoté*, art. 2154 and notes thereon. If the defendant assumed the debt it was merely a *personal* liability.

2. If the privilege be sustained it must be *subsequent* to

the mortgage in favor of Lessassier and his assignees, which this court has sustained. When a prior mortgage is suffered to lapse for want of re-inscription, the mortgages next in rank take precedence.

EASTERN Dis.  
January, 1841.

DUPUY  
VS.  
DASHIELL.

3. If the defendant's assumpsit be sustained against him even as a personal liability he may avail himself of all the payments made by his vendor, Lessassier, and several evidences of payment were improperly rejected, and the interest was improperly computed.

4. The lower court instructed the jury improperly, and erred in refusing to charge them as prayed for by defendant's counsel. A new trial should have been granted and it was refused on erroneous grounds after an improper verdict was rendered.

5. The judgment should be reversed, and if any judgment be rendered against the defendant, it should be only for what he assumed to pay, as merely a personal obligation, without any privilege.

6. In decision of suit between the same parties on same cause of action this court declares "the present defendant *assumed to pay plaintiff's claim*," but does not declare that he consented to or contracted a mortgage on the property to secure the same.—See 15 La. Rep., 125.

*Morphy J.* delivered the opinion of the court.

The parties to this suit appeared before us at last March term in an appeal from an order of seizure and sale sued out by plaintiff. The amount due and assumed to be paid by defendant appearing doubtful and unadjusted in the sale of the property to him, the executory proceedings were set aside and the plaintiff left to proceed by ordinary suit.—15 La. Rep., 125.

The petitioner in her own right and as administratrix of the succession of M. Dupuy, since deceased, seeks to recover, as a mortgage debt on the land and slaves sold by

**EASTERN DIS.** the deceased to T. Lessassier, and now owned by the de-  
**January, 1841.** fendant, the sum of \$13,200, the amount of the price

**DUPUY**  
**vs.**  
**DASHIELL.**

with ten per cent. interest per annum on \$11,000 from the 1st of April, 1830. She claims this under the mortgage stipulated in the sale of Dupuy to Lessassier, and the assumption of it by the defendant in the sale of the property to him by Lessassier. The defence set up is that Dupuy's mortgage has been prescribed for want of a re-inscription within the ten years following the date of its registry; and that the debt has been extinguished by various payments made by Lessassier; a note of Dupuy to the order of one Menier, which was held by Lessassier, was also pleaded as a set-off.

The case was tried before a jury who gave plaintiff a verdict for \$11,640, with interest at ten per cent. per annum for two years and a half back until paid with mortgage and privilege on the property. A motion for a new trial was made and refused by the court, who, upon a *remittitur* being entered by the plaintiff's counsel, rendered judgment only for \$8659, with interest at ten per cent. per annum from the 20th of June, 1835, till paid; from this judgment the defendant appealed.

The record shows that on the 13th of August, 1828, Marcel Dupuy sold to T. Lessassier a tract of land and negroes for \$13,200, of which \$2200 were payable in March, 1829. As to the balance, the purchaser had the privilege to postpone the payment of it from year to year, until the end of March, 1838, on paying ten per cent. per annum interest thereon; with the understanding that all monies paid on account in that interval should be received and imputed in payment of the principal. On the 8th of March, 1836, T. Lessassier sold the same land and slaves together with other adjoining lands and other slaves to the defendant for the sum of \$60,000, payable in five instalments of \$12,000 each; the first payable as soon as the renuncia-

tion of the vendor's wife could be obtained, and the four others at one, two, three and four years from the day of sale. But as there were, according to the certificate of the parish judge, certain mortgages bearing on the land and slaves in favor of the several vendors to Lessassier, and among others the one in favor of M. Dupuy, it was agreed that Dashiell should give notes on the second and third instalments, only for the balance remaining on them after deducting the mortgage claims due by Lessassier on the property; he, Dashiell, retaining in his hands the amounts so deducted. Thus it is stated that on the payment due the 8th of March, 1837, of \$12,000, there shall be retained in his hands by the vendee, who *assumes the payment thereof*, \$1800, mortgage due to Mrs. E. Le Blanc; \$5000, due to Woodward, and \$1100, interest due to M. Dupuy on the 13th August, 1837; leaving only \$4100, for which the purchaser furnished his note. In like manner, from the sum of \$12,000 due the 8th of March, 1838, there was retained \$640, interest due 13th August, 1838, and the capital due to M. Dupuy, to wit: \$11,000, leaving only a balance of \$360, for which the purchaser gave his note. For the fourth and fifth instalments, notes in full were given, but as there were some doubts whether the sums due on the mortgages were accurately stated, it was agreed that the notes should remain deposited in the notary's hands, subject to an ulterior adjustment.

Dupuy's mortgage was first recorded on the 13th of October, 1828, and it was re-inscribed only on the 9th of March, 1839. It is clear that this renewal of the registry after the expiration of ten years, could not avail the plaintiff against an ordinary third possessor or subsequent mortgagees. But plaintiff contends that the defendant, in the sale to him, assumed the payment of the mortgage, and that the recording of this act operated as a re-inscription of it; that if it does not, the defendant's declarations and

EASTERN Dis.  
January, 1841.

DUPUY  
vs.  
DASHIELL.

The renewal of the registry of a mortgage after the lapse of ten years from the recording, cannot avail the mortgagee against an ordinary third possessor or subsequent mortgagees.

EASTERN Dis. assumptions in the sale are equivalent to the granting of January, 1841.

DUPUY  
VS.  
DASHIELL.

a new right of mortgage on the plantation and slaves sold in favor of Dupuy. The defendant, on the other hand, denies that the old mortgage of Dupuy was assumed or a new one created, because the assumption, he maintains, was only a personal obligation on his part to pay the debt of Dupuy, and that any part of it which may be found due is not secured by mortgage. It is not necessary to decide, nor are we prepared to say, that the registry of the assumption of a mortgage by a second purchaser must operate as a renewal of the recording of it against third persons to all intents and purposes, but surely the objection of the want of a new registry comes with a singular bad grace from the defendant, and cannot avail him. Independent of the general declaration that he assumes the amount of the mortgages

on the property by him purchased, he agrees to assume the payment of certain specified mortgage claims which he on that account deducts from the second and third instalments and retains in his hands. Is not this a clear assumption of Lessassier's obligations as a mortgage debtor? He says in another part of the deed that the plantation and slaves are to remain specially mortgaged to secure the payment of the four last instalments of \$12,000 each, a part of which, by his own stipulations, was made payable to the mortgage creditors of his vendor, and the balance only was made payable to Lessassier himself in the notes agreed to be given. This clause we think had the effect of giving a new right of mortgage to Dupuy, Le Blanc and Woodward, to secure the sums due them by Lessassier on the property. It is such a stipulation as would have entitled M. Dupuy to sue out directly against the defendant an order of seizure and sale instead of resorting to an hypothecary action; had the amount thus assumed been finally adjusted in the sale. But even if there could be any doubt as to this right of mortgage under the defendant's assumption and declarations, the plain-

But where a subsequent purchaser assumes the payment of the mortgage debts due the original vendor, he cannot avail himself of the want of re-inscription of the original mortgage within the ten years.

Where the subsequent purchaser assumes the mortgage debts of his vendor to the original seller, with a clause that the "plantation and slaves remain specially mortgaged to secure the payment," has the effect of giving a new right of mortgage to the original vendor.

made payable to Lessassier himself in the notes agreed to be given. This clause we think had the effect of giving a new right of mortgage to Dupuy, Le Blanc and Woodward, to secure the sums due them by Lessassier on the property. It is such a stipulation as would have entitled M. Dupuy to sue out directly against the defendant an order of seizure and sale instead of resorting to an hypothecary action; had the amount thus assumed been finally adjusted in the sale. But even if there could be any doubt as to this right of mortgage under the defendant's assumption and declarations, the plain-

tiff would be entitled to exercise Lessassier's lien, as vendor of the property; because the sums deducted from the instalments and retained by defendant are part of the purchase money which Lessassier stipulated should be payable to Dupuy and others in discharge of his obligations to them. Under this *stipulation pour autrui*, Dupuy has, as to the sums due him, all the rights and privileges which Lessassier himself could exercise on the property.

EASTERN Dis.  
January, 1841.

DUPUY  
VS.  
DASHIELL.

We come next to the plea of payment set up by the defendant. To sustain it he has introduced several receipts of Dupuy from Lessassier; the payments they establish are admitted except two, to wit: one of \$1000 and another of \$300. Two accounts were filed by the plaintiff as rebutting evidence in relation to these disputed payments. In the first of these accounts exhibiting a debt from Dupuy to Lessassier of \$2827, and receipted by the latter on the 21st of April, 1832, is mentioned a sum of \$1000 *à vous comté le 13 Mars, 1832*, being the very date of the receipt produced for the \$1000, and a receipt for \$4960 is executed on the very day that this account was receipted for by Lessassier, to wit: the 21st of April, 1832, showing clearly we think, that the one of \$1000 now brought against Dupuy had already been charged to him in the receipted account in his possession, and that this account of \$2827 was part of the payment of \$4960 acknowledged by Dupuy to have been made the very day Lessassier receipted the said account. The same remark must apply to a draft of \$300 of Dupuy in favor of V. Babin, and paid by Lessassier; its amount appears to have already been charged to Dupuy in an account receipted by Lessassier on the 26th of July, 1833, the very day that Dupuy gave Lessassier a receipt for \$1240. As to the note of \$1333 69, offered by defendant as a set-off, it appears that this note is not endorsed by Menier, to whose order it was drawn by Dupuy, and has remained the property of Menier till the time of his death; it was inventoried as belonging to his estate, and came to the hands of



**EASTERN DIS.** Lessassier as administrator of his succession; no evidence is shewn that Lessassier acquired any right of ownership in this

*January, 1841.*

**DUPUY**  
vs.  
**DASHIELL.**

The subsequent purchaser and third possessor who assumes the debts of his vendor, can also avail himself and plead any payments the vendor may have made and not allowed.

note which would have enabled him to plead it in compensation against a debt due by himself. The plea of set-off based upon it by defendant, cannot therefore be sustained. Excluding then the three items just examined, and allowing the defendant the right which he clearly has, of availing himself of and pleading all the payments proved by Dupuy's receipts, we find upon making the imputation of these sums on the principal and interest due by Lessassier, a balance in favor of plaintiff of 6186 94, which was due on the 20th of June, 1835, the date of Dupuy's last receipt. The judgment below must be set aside because it does not follow the verdict; and because we think that there is error in the verdict itself in not allowing the defendant the benefit of the payments proved to have been made by Lessassier.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and proceeding to give such judgment as in our opinion ought to have been rendered below, it is ordered that there be judgment in favor of the plaintiff in her said capacity, for the sum of six thousand one hundred and eighty-six dollars and ninety-four cents, with interest at the rate of ten per cent. per annum from the 20th of June, 1835, until paid, with mortgage and privilege on the land and slaves sold by Marcel Dupuy to Timoleon Lessassier; and it is further ordered that the said property be seized and sold according to law, to satisfy the debt and mortgage aforesaid, with costs in the court below; the appellee to pay the costs of this appeal.

AVART *vs.* BANKS.EASTERN Dis.  
January, 1841.

APPEAL FROM THE COURT OF THE SECOND DISTRICT FOR THE PARISH OF

TERREBONNE, THE JUDGE OF THE FOURTH DISTRICT PRESIDING.

AVART  
*vs.*  
BANKS.

There was judgment by default, and no attempt to show error on the appeal, the judgment was affirmed with damages, as a delay case.

This is an action on an overseer's account for the balance due him on his wages. There was no defence, and judgment by default was made final on proof of the plaintiff's demand. The defendant appealed.

*Beatty*, for the plaintiff and appellee, prayed the affirmation of the judgment with damages. No counsel appeared for the defendant.

*Morphy J.* delivered the opinion of the court.

The defendant has appealed from a judgment decreeing him to pay a certain amount of wages claimed by Plaintiff as his overseer. He has suffered himself to be condemned by default in the court below, and has made no attempt in this court to show error in the judgment appealed from. The appellee has prayed for damages, and we think they should be awarded.

There was judgment by default, and no attempt to show error on the appeal, the judgment was affirmed with damages as a delay case.

It is therefore ordered that the judgment of the District Court be affirmed with costs and five per cent. damages.

EASTERN Dis.  
January, 1841.

CHURCH, ET AL vs. HENRY.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

CHURCH ET AL

vs.  
HENRY.

The statute law of Mississippi authorises defendants in attachment for *debts not due*, to give bond *with security* for the payment of the *debt at maturity*; which is binding on the principal *and surety*, without any judgment having been first obtained by the creditor against his debtor for the amount of his demand.

This is an action against the surety in an attachment-bond taken under the laws and in the State of Mississippi, authorising attachments to issue for debts not due; and also allowing the defendant in such cases to give a bond with security to pay the debt when it becomes due, and thereby release his property.—See Howard and Hutchinson's Digest of the Statutes of Mississippi: ch. 43, sec. 25, pp. 553-4.

The plaintiffs show that on the 12th April, 1839, they sued out an attachment in Hinds county, in the State of Mississippi, on two notes of Massey & Wasson, not then due, but to become in June following, and that the latter immediately gave a bond with security, conditioned, that "if Massey & Wasson did *pay the two notes at maturity*, that the bond should be null and void; otherwise to remain in full force."

The attachment suit was dismissed by the Circuit Court of Hinds county on the 22d May following. It seems, however, the defendants filed a plea in abatement for a misnomer; but the attorney testifies that the dismissal was his own act, because the bond operated as a termination of the suit. The suit was dismissed at plaintiff's costs.

The notes on becoming due in June following this attachment and bond, were protested for non-payment. The defendant, Henry, being one of the sureties in said attachment bond, and found in the city of New Orleans, was arrested and held to bail in the present action instituted on said bond.

The defendant admitted his signature to the bond, but denied his liability under the circumstances of the case. That

the bond was never filed in court in Mississippi as it was by EASTERN DIS. January, 1841. law required to have been done; but on the contrary was sent CHURCH ET AL. vs. HENRY. to this city. He further avers that on the dismissal of the attachment suit in Mississippi, the bond became null and void.

Upon these pleadings and issue, and on the evidence there was judgment for the defendant, and the plaintiffs appealed.

*L. Janin*, for the plaintiffs—

1. The condition of the bond was, as above stated, that the securities should pay the two notes, if they were not paid by Massey & Wasson at maturity. It was absolutely for the payment of the money and there was no other condition in it whatever.

2. It is proved by two practising lawyers in Mississippi and by the constable who executed the bond, that under the laws of Mississippi, the defendant in an attachment suit, when the debt is not yet due, has the option, either to give a common replevin bond for the forthcoming of the property, or to give a bond for the payment of the debt at maturity, and that in the latter case the bond is not usually filed in court but delivered to the plaintiff, who can bring suit on it in any part of the world. Such a bond for the absolute payment of the debt puts an end to the suit, but may be the foundation of a new suit. On the 22d of May, 1839, Massey & Wasson put in a plea in abatement, founded on a misnomer, but then, it has been seen, the suit was already at an end. This entry on the minutes of the Court of Hinds county is found: "This cause was called up and the suit dismissed at plaintiffs' costs. The evidence of Trimble, the attorney of plaintiffs in that suit, shows that this dismissal was his own act. As soon as the case was called up, he discontinued it, because the bond he had obtained operated as the termination of the suit. He says, that after the bond had been given no further proceedings could be had in the suit. The entry on the minutes mentions neither the appearance of parties, or arguments of counsel or any plea on file,

EASTERN DIS. which assuredly would have been done if the suit had been  
January, 1841. dismissed at the instance of the defendants.

CHURCH ET AL.

VS.

HENRY.

3. In relation to the validity of the bond and its effect, the 25th section of the 43d chapter of the Statutes of Mississippi describe the cases and the manner in which attachments may issue for debts not due, and says (last proviso), "that all such attachments shall be repleviable in the same manner as other attachments are by law." The 15th section, page 550, says "that all attachments shall be repleviable . . . on the appearance of the defendant, and putting in good special bail, or by giving bond with security to the Sheriff," &c. These are the only statutory provisions of the law of Mississippi on the subject. Nothing more definite is said concerning the condition of the bond. Does this prevent parties from giving such bonds as the one sued on in the present case, when the debt is not due? The plaintiffs have shown that the constant practice is to leave to defendant the choice between the different bonds, that where it is given in the form of the bond sued on, it operates as a collateral security, as a compromise it puts an end to the suit, and is binding according to its tenor. The bond signed by the parties is their law, in this case it has the sanction of reason, justice and constant practice, it is opposed by no prohibitory law, and the defendants have left the testimony of the plaintiffs uncontradicted.

4. As to the law, it has been long settled that the obligor on a bond cannot contest his liability on the ground that it does not pursue the terms of a statute, if the statute is not a prohibitory one and no improper practices have been resorted to to obtain it.—*Lartigue vs. Baldwin*, 5 M. Rep., 194.—*Villeré vs. Armstrong*, 4 Martin, N. S., 25.—*Morgan vs. Furst*, 4 idem, 117, 122.—And particularly *Andrew Morse vs. Isaac Hodson*, 5 Mass. Rep., 314.—*Baker vs. Haley*, 5 Greenl., 240.—*Winthrop vs. Dockendorff*, 3 Greenl., 156, and 2 Cranch, 28.

5. The bond creates a joint and several liability under the

law of Mississippi although it should express but a joint liability on the face. It was a joint and several one.—Statutes of Mississippi, edition of 1840, p. 578, sec. 9.

EASTERN DIS.  
January, 1841.  
CHURCH ET AL.  
VS.  
HENRY.

6. Interest at the rate of eight per cent. to be allowed from the maturity of the notes.—Same edition of the Statutes, p. 275, sec. 16.

*Peyton*, contra, insisted that the judgment should be maintained, because the bond sued on is a replevin bond, and the suit in Mississippi was dismissed in consequence of its execution. No action can be maintained on it here or elsewhere, as the plaintiffs have no judgment.

2. The officer in levying the attachment had no authority to require in his official capacity any other than a replevin bond; although the parties might have compromised the case, and a bond for the debt might have been given. In that case the papers would not have been returned into court; but all proceedings must have been dismissed.—Howard and Hutchinson's Statutes of Miss., chap. 43, sec. 11, 12, 13, 14, 15, and 25; pages 548, 549, 550, 551, 554.

3. In all cases of attachment before the debt is due, it is replevable in the same manner as other attachments.—Idem, sec. 25; section 19 prescribes the duty of the sheriff in replevying property seized.

*Garland, J.* delivered the opinion of the Court.

The plaintiffs, holders of two promissory notes amounting to \$698 50, drawn by Massey & Wasson, residents of Mississippi, instituted a suit against them, by attachment, in Hinds county, before the notes fell due, alledging the drawers were about to remove to Texas. The attachment having been levied on property belonging to Massey & Wasson, they gave a bond with several sureties (of whom the defendant is one,) in double the amount of the sum claimed, the condition of which was, if Massey & Wasson should



EASTERN DIS. pay the amount of the notes sued on at maturity, the bond  
January, 1841. should be void; otherwise to remain in full force and effect.  
CHURCH ET AL. The notes were not paid when they became due and  
VS. the defendant being temporarily in this State, was sued on  
HENRY. his obligation and held to bail. When this bond was taken, it was handed by the officer who executed the attachment to the plaintiffs or their attorney, and the suit was dismissed by them at their costs.

The defendant contends that as the attachment was dismissed in Mississippi the bond thereby became void, and further that the bond was not taken in accordance with the statute of that State, and therefore null. Under the laws of this State such a bond would probably be of no validity, but this case is to be decided upon the statute of a sister State, upon the proper construction of which, we regret there is no decision of their tribunals to enlighten us.

The 25th section of the act of June 7th, 1822, found in Howard & Hutchinson's compilation of the Statutes of Mississippi, pages 553-4, authorizes the issuing of attachments before the debt is payable, it prescribes the cases, the oath to be taken and the bond to be given by the plaintiff, and the mode of service by the officer. The law then says, "If such debtor shall not, on or before the return of such attachment, enter into bond, with sufficient security, for the payment of the said debt when it shall become payable, the court on due proof of the justice thereof and of the intention of the debtor to remove, or of his having actually removed out of the State, shall grant judgment as in other cases of attachment" against the debtor or garnishee and execution is to be stayed until the debt becomes due, or the property sold payable when it is due. The proviso to the section further says: "All such attachments shall be replevable in the same manner as other attachments are by law replevable" and the debtor may defend the suit as in other cases.

This statute we think authorizes the debtor to give one of two bonds, either of which, if properly taken, binds him and his sureties. If he does not wish to defend the suit and wishes to release his property, he may give a bond to pay the debt at maturity, and then the fair inference from the statute is, the creditor cannot proceed to judgment, but must stop his suit as was done in this case; but if the debtor wishes to defend in the attachment he may replevy the property, enter his appearance and defend himself, and if the creditor is defeated in his attachment in any manner, the bond is avoided. In this case, Massey & Wason gave the bond to pay the debt at maturity, the defendant signed it as their surety, the suit was dismissed, as appears by the evidence, on motion of the counsel of the plaintiffs; we therefore think the bond was properly taken, and that the defendant is responsible for the debt and interest, which is proved to be at the rate of eight per cent. per annum, and also for three dollars and fifty cents, the cost of protest.

EASTERN DIS.  
January, 1841.

CHURCH ET AL.  
VS.  
HENRY.

The statute law of Mississippi authorizes defendants in attachment for debts not due, to give bond with security for the payment of the debt at maturity; which is binding on the principal and surety, without any judgment having been first obtained by the creditor against his debtor for the amount of his demand.

It is therefore ordered and decreed that the judgment of the Commercial Court be reversed and annulled, and this court proceeding to render such judgment as ought to have been rendered in the court below, further orders, adjudges and decrees, that the plaintiffs, Church & Kyle, do recover of and have judgment against the defendant, Isaiah Henry, for the sum of seven hundred and two dollars, with interest at the rate of eight per centum per annum on the sum of five hundred and twenty-eight dollars and fifty cents (\$529 50) from the 4th day of June, in the year 1839 until paid, and like interest on the sum of one hundred and sixty-nine dollars (\$169) from the 4th day of July, in the same year, until payment, and also for costs in both courts.

**EASTERN DIS.**  
**January, 1841.**

**ZACHARIE vs. WINTER.**

**ZACHARIE**  
**vs.**  
**WINTER.**

APPEAL FROM THE COURT OF THE SECOND DISTRICT FOR THE PARISH OF  
 ASCENSION, THE JUDGE OF THE 4TH DISTRICT PRESIDING.

Where the judgment creditor purchases in the property of his debtor at sheriff's sale, and reconveys it to him on certain terms and conditions; from the moment of the adjudication it is an extinguishment of the judgment for the *price* bid on the property; and no new execution can issue on the judgment without notice, and contradictorily with the judgment debtor.

A subsequent mortgagee of property sold at sheriff's sale who made a private arrangement with the purchaser, who was the seizing creditor, was an incompetent appraiser. A fraudulent appraisal is, as if none had been made.

A sheriff's sale of immoveable property must be made at the seat of justice for the parish where the seizure is made; unless in the country, and the debtor requires it to be made on the plantation, which fact must be stated in the advertisement.

This case comes before the court on an opposition to a monition taken out by the plaintiff to have a sheriff's sale made to him homologated and confirmed.

The defendant confessed judgment, on the 14th October, 1837, on an account for advances, commissions and supplies furnished, by the firm of J. W. Zacharie & Co. for \$14,927, with ten per cent. interest per annum; eleven thousand dollars of which was secured by mortgage. Execution was stayed for one half until March, 1839; and on the balance until March, 1840. The first half of said judgment not having been paid at the expiration of the delay given, execution issued on the 5th April, 1839, for this half and the sugar plantation of the defendant adjoining the town of Donaldsonville, containing 800 superficial arpents together with 47 slaves, were seized. The sheriff returned that after having complied with the legal formalities, and after advertising the property by advertisements at the church and court house doors, and in the newspaper published in Donaldsonville, on the 6th June he proceeded to the plantation of the defendant where the sale was advertised to take place, and adjudicated

the property to the present plaintiff, J. W. Zacharie, for the price of \$40,050 as the highest and last bidder; but the amount of the adjudication was not paid in consequence of an agreement the day after the sale was passed, *between the parties, plaintiff and defendant in the execution*, in which they declared the sale was null and void, and all the proceedings under the execution were by them held as though they had never taken place. "The deed of sale was made out in due form by the sheriff to the purchaser on the 8th," and recorded the 9th June. All this is stated in the sheriff's amended return of the 27th May, 1840.

EASTERN DIS.  
January, 1841.

ZACHARIE  
VS.  
WINTER.

On the 27th January, 1840, a second execution issued on this judgment for the whole amount, and the sheriff seized the plantation and slaves of the defendant, and all the stock thereon, and advertised them in the news paper, and by advertisements posted up at the court house and church doors of the parish for 30 days. Upon the day of sale the defendant was duly notified and failed to appoint an appraiser. The sheriff appointed Manuel Fuentes and the plaintiff J. V. Cresap, who were sworn and made the appraisement. The sheriff then proceeded to sell the entire property seized, in block, and it was adjudicated to J. W. Zacharie as the last and highest bidder for \$32,250 on the 6th March; the purchaser retaining \$9,261 for the payment of his debt, and the balance after paying costs of sale, &c. was to be applied to the payment of the mortgage debts due by the defendant and existing on the property.

Zacharie took out a monition under the act of 1834 to perfect the sheriff's sale to him, to which the defendant made opposition on various grounds.

1. That the judgment on which the second execution issued was satisfied by the first sale.
2. The execution issued for the whole amount of the judgment when only half of it was executory.

EASTERN DIS. 3. That the land, slaves, &c. were not legally advertised  
January, 1841. in the manner and for the length of time required by law.

ZACHARIE.  
VS.  
WINTER.

4. There was no legal and proper appraisement; and by the illegal acts of the sheriff and of the plaintiff, the property was falsely and fraudulently appraised at not more than half its value.

5. The sale was not made at the seat of justice of the parish as the law requires.

The opponent avers that the plaintiff was well acquainted with all the nullities of the sale when the property was delivered to him, by reason of which and of all the defects and nullities set forth the said sale should be annulled and the said Zacharie ordered to deliver up the property to him.

It appeared by the evidence that Cresap one of the appraisers, had a judgment and mortgage against Winter at the time of this sale for \$5,568, and that he had an understanding and an arrangement with Zacharie that he should buy in the plantation and slaves and they would both take them into possession and conduct it; that two other appraisers declined acting because the negroes and part of the property was not shown to them.

There was judgment dismissing the application for a monition; rescinding and annulling the sale and ordering Zacharie to deliver up the property to Winter. The former appealed.

*Ilsey and Nicholls* for the plaintiff, insisted on the reversal of the judgment; that the monition law only extended to mere defects in the manner of making the sale. The formalities required by law were pursued by the sheriff and the sale should be maintained.

*Miles Taylor* for the defendant, urged the nullity of the sale on the grounds stated in the opposition, and cited various authorities in support thereof.

*Eustis* for the plaintiff in conclusion.

EASTERN DIS.  
January, 1841.

*Bullard J.* delivered the opinion of the court.

ZACHARIE  
VS.  
WINTER.

This is an appeal from the judgment sustaining the opposition of Winter to the homologation of a sheriff's sale of his plantation and slaves made under color of a writ of *feri facias* issued on a judgment recovered by Zacharie & Co. against him. The facts necessary for our present purpose are, that Zacharie & Co. recovered a judgment against Winter upon which an execution issued and the plantation and slaves were sold and were purchased by J. W. Zacharie the present appellee. The parties afterwards entered into an agreement before a notary, by which it was stipulated, after reciting the previous judgment, execution and sheriff's sale, that for and in consideration of two thousand six hundred dollars to be paid by Winter, Zacharie renounces and abandons to said Winter all the right, title and interest which he had acquired and transfers the same to him, that he may use and enjoy the same as if no adjudication had taken place. In consideration of the said renunciation, it was further agreed that the judgment by virtue of which the said sale had been made should be reinstated and considered as binding and valid as if no sale had been made by virtue of an execution which issued under it. The terms of payment of the debt for which the judgment had been rendered were extended for one half until January, 1840, and the balance until 1841, until which periods no execution should issue. To secure the payment of the sum of \$2,600, the same property is mortgaged by the act, and it was made payable in January, 1842.

When the first installment fell due a *feri facias* was issued upon the original judgment for the full amount but was stayed as to one half, and the plantation and slaves were again seized and finally adjudicated again to Zacharie, who procured a monition from the district court in pursuance of the act of 1834, calling on all persons to show cause why the



EASTERN DIS. sheriff's sale should not be homologated, as Winter filed his  
January, 1841. opposition upon the following grounds :

ZACHARIE  
vs.  
WINTER

1st. That the judgment in the suit of Zacharie & Co. *vs.*

Winter was satisfied by a sale made by the sheriff, on or about the 6th of June, 1839, in virtue of an execution issued thereon, and that consequently there was no judgment then in force upon which the execution could legally issue in virtue of which this pretended sale was made.

2d. The execution was illegally issued for the sum of \$14,927 67, whereas in truth the plaintiff was only entitled, if to any at all, to an execution for one half of said sum.

3d. That the sale was not legally advertised in the manner and at the place provided by law.

4th. The sale was not advertised for the length of time required by law.

5th. That a just and true appraisal of the property was not made according to law before the sale, and that by the illegal acts of the sheriff or his deputy, and the illegal practices of said Zacharie the same was falsely and fraudulently appraised at not more than half its just value.

6th. That the sale was not made at the seat of justice of the parish as the law required.

The district court sustained the opposition on the first, second, fifth and sixth grounds and annulled the sheriff's sale, and the plaintiff appealed.

I. On the first ground it appears to us, that the contract before the notary amounted to a retrocession of the property to Winter. The parties admit the adjudication under a former writ of fieri facias and consequently that the property had vested in Zacharie the purchaser. The right thus acquired was renounced and the property retransferred to Winter for a new and distinct consideration, to wit: the sum of \$2,600, and the renewal of the former debt. Like every other contract it was liable to be questioned and its legal

validity to be enquired into by the parties. Suppose that in the interval between the first adjudication and the retrocession judgments against Zacharie had been recorded in the mortgage office of the parish in which the property is situated, it seems to us clear they would have attached to the property,

EASTERN DIS.  
January, 1841.

ZACHARIE  
vs.  
WINTER.

and might have furnished good grounds against the execution of the contract, and consequently the judgment which it purports to reverse might be subject to be modified by a court of ordinary jurisdiction. Again the whole contract must be taken together as an entire thing, and if an ordinary *fieri facias* could properly issue for a part without any further judicial action it is not so obvious why it could not for the whole including the \$2,600, for which no judgment has ever been rendered. But it is contended, that Zacharie's judgment was not satisfied by the sheriff's sale which remained incomplete, the price not having been paid. The moment the parties admit that there was an adjudication, they necessarily admit, that if the judgment creditor became the purchaser the price bid by him is offset against the judgment, and consequently amount to an extinguishment of it pro tanto at least as to third persons. We are of opinion that a writ of *fieri facias* ought not to be issued without some notice to the appellee in the nature of a *scire facias*, and giving him an opportunity to contest the same.

Where the judgment creditor purchases in the property of his debtor at sheriff's sale & reconveys it to him on certain terms and conditions; from the moment of the adjudication it is an extinguishment of the judgment for the price bid on the property, and no new execution can issue on the judgment without notice and contradictorily with the judgment debtor.

II. The opinion already expressed upon the first ground of opposition renders it unnecessary to enquire whether the *fieri facias* issued for too much.

V. We are satisfied that this ground of opposition was properly sustained. It is evident that one of the appraisers being a subsequent mortgagee of the same property, and having made a private arrangement with Zacharie was not an impartial appraiser. But we do not concur with the district court in opinion that the allegation, that the appraisement was a fraudulent one, ought to be struck out. If the appraisement

A subsequent mortgagee of property sold at sheriff's sale who made a private arrangement with the purchaser, who was the seizing creditor, was an incompetent appraiser. A fraudulent appraisement is, as if none had been made.

EASTERN DIS. was fraudulent, it was as if none had been made, which January, 1841. would clearly be a sufficient ground of opposition.

LANDRY

VS.

BAUGNON.

VI. The last ground is well taken and clearly sustained by the evidence. Articles 664 and 665 of the Code of Practice declare that sheriff's sales shall be made at the seat of justice

A sheriff's sale of immoveable property must be made at the seat of justice for the parish where the seizure is made; unless in the country, and the debtor requires it to be made on the plantation, which fact must be stated in the advertisement.

for the parish where the seizure is made, at the spot where it may have the greatest degree of publicity; but that in the country the sale may be made on the plantations which are to be sold if the debtor requires it, but in that case notice must be given of the fact in the advertisement of sale. In the present case the sale was made on the plantation not only without the consent, but contrary to the will of the debtor.

It is therefore adjudged and decreed that the judgment of the District Court be affirmed with costs.

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### LANDRY vs. BAUGNON.

APPEAL FROM THE COURT OF THE 4TH DISTRICT, FOR THE PARISH OF  
IBERVILLE, THE JUDGE THEREOF PRESIDING.

In an affidavit for a new trial on the ground of newly discovered evidence, since the trial, the party must not only show that he used every effort in his power to procure the evidence, but also that it is admissible and material under the pleadings.

So in a motion for a new trial, after judgment by default is made final, newly discovered evidence of payment, is insufficient, as it would not be admissible without new pleadings or answer filed; and no amendment of the pleadings will be permitted after judgment.

To prove the extinguishment of the debt by payment, such payment must be specially pleaded.

This is an action to recover the sum of three hundred dollars and the interest thereon; the balance of the price of a

tract of land which the plaintiff shows he sold to the defendant in 1835, for the sum of twenty-five hundred dollars. He prays judgment for the amount of his debt and interest.

EASTERN DIST.  
January, 1841.

LANDRY  
vs.  
BAUGNON.

This suit was instituted the 14th September, 1840, and on the 5th October following judgment by default was made final on the minutes of the court. On the 8th the defendant appeared by counsel and moved the court for a new trial; on the ground that he had discovered evidence since the judgment was rendered by which he could prove that the debt sued for was entirely paid and extinguished. He filed his affidavit to this effect.

The district Judge overruled the motion and the defendant appealed.

*Labauve*, for the plaintiff.

*Burke*, contra, submitted a written argument urging a reversal of the judgment, and that the case be remanded for a new trial *denovo*.

*Simon J.* delivered the opinion of the court.

Defendant is appellant from a judgment by default rendered and made final against him. Before taking his appeal, he made a motion for a new trial, which was overruled by the lower court; and as the record comes up without any statement of facts and without the proper certificate of the clerk that it contains all the evidence adduced in the case, the only question submitted to our consideration, is whether the Judge erred in overruling the motion for a new trial.

The affidavit of the defendant in support of his motion, is in these words: "that it is true as alleged in the above statement of grounds for a new trial that the plaintiff's demand had been long anterior to the institution of this suit, paid; written evidence of which payment the deponent has lost or mislaid, but that he has discovered since the trial of the cause

**EASTERN DIS.** R. B. a witness who will prove the existence, execution and  
**January, 1841.** contents of said lost or mislaid written evidence of payment,

**LANDRY**  
**vs.**  
**BAUGNON.**

testimony which he could not with due diligence have obtained before." Now, in supposing this affidavit to be sufficient, the facts said to have been discovered since the trial

In an affidavit for a new trial on the ground of newly discovered evidence, since the trial, the party must not only show that he used every effort in his power to procure the evidence, but also that it is admissible and material under the pleadings. of the cause, would be applicable only to a defence which was not set up, and it is perfectly clear that whenever a new trial is applied for on account of new evidence discovered since the cause was tried, the party must show not only that he has used every effort and diligence in his power to procure it, but also that it is admissible and material under the pleadings. *7 La. Rep. 82.—10 La. Rep. 155.*—In this case however, no issue was joined by the defendant, as the judgment is one by default,; but we think that this cannot better his pleadings.

So in a motion for a new trial, after judgment by default made is final, newly discovered evidence of payment, is insufficient, as it would not be admissible without new pleadings or answer filed; and no amendment of the pleadings will be permitted after judgment. situation, as in order to authorise the introduction of the newly discovered evidence for the purpose of proving the extinguishment of the debt by payment, such payment must be specially pleaded. *6 La. Rep. 457;*—and as he would not be allowed to introduce any such evidence without amending the pleadings and filing an answer, which cannot be permitted after judgment. *3 La. Rep. 487.*—If the defendant's allegation that he has paid the debt be a serious defence, why did he not plead it? why did he suffer a judgment by default to be rendered against him? he must have known that a judgment by default is a tacit admission of the justice of the demand.

To prove the extinguishment of the debt by payment, such payment must be specially pleaded. *C. of P. art. 360.* His affidavit does not even show any reason why he did not or could not defend the suit in due time; and if he be made to suffer from his neglect, we cannot, as the case stands, afford him any relief.

We are of opinion that the district Judge did not err in overruling the motion for a new trial.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

**BLACK vs. SAVORY ET AL.**EASTERN DIS.  
January, 1841.APPEAL FROM THE COURT OF THE FOURTH DISTRICT FOR THE PARISH OF  
IBERVILLE, THE JUDGE THEREOF PRESIDING.

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BLACK  
vs.  
SAVORY ET AL.

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The owners of a steamboat transporting passengers and carrying merchandize for hire are commercial partners and may be sued individually or a portion of them, for a debt due by the boat, without joining *all* the parties in the action.

After dissolution of the partnership the partners should be sued in the parish or place of their domicile, and only those residing in the same parish can be joined.

The acknowledgment of masters of steamboats, of the correctness of bills presented for supplies or other things furnished the boat, are binding on the owners.

This is an action on a grocer's account for supplies furnished the steamboat Alpha. The account is acknowledged to be correct and just by King, the master, and one of the owners of the boat.

The suit was instituted in the parish of Iberville, where the defendants, Savory and Marshall, two of the owners of said boat, reside; and it is admitted there are other owners and partners residing elsewhere. The plaintiff prays judgment for the amount of his account against the defendants *in solido*.

The defendants excepted to the action because all the owners and partners were not joined; and that the suit cannot be maintained against a part of them only. This exception being overruled, the defendants pleaded the general issue; and aver that the demand is not just; that the boat had already been seized and sold to satisfy the debts and claims due by it and the partnership long since dissolved. That King, who commanded the boat had no authority to admit the plaintiff's account. They pray that the suit be dismissed.

There was a bill of exceptions taken to the admission of the account as acknowledged by King, in evidence, as being only secondary.

There was judgment for the plaintiff, and the defendants appealed.



EASTERN DIS. *Edwards*, for the plaintiff, urged the affirmance of the judgment.  
January, 1841.

BLACK  
VS.  
SAVORY ET AL.

*Labauve*, for the defendants and appellants, insisted that the action could not be maintained against two only of the owners or partners, where it was shown and admitted that there were at least four, who should have been joined.—See 13 *La. Rep.*, 422.

2. The court erred in receiving the admissions or acknowledgments of King relative to the account. These were only secondary evidence. The account should have been proved by positive testimony.

3. The plaintiff has failed to show by legal evidence that this pretended account was for the partnership, or articles furnished for its use or benefit.

*Garland, J.* delivered the opinion of the court.

The plaintiff, who is a grocer in the parish of Iberville, brought suit against Savory and Marshall, alledging that they, with King, Mays, and others were owners of a steamboat called the Alpha, to which he had furnished supplies and sold a quantity of provisions, liquors, and other articles amounting to \$327 07. The account is acknowledged in writing by J. H. King, one of the owners and master of the boat, to be correct. The defendants admit in their answer the partnership was dissolved in the latter part of February, 1840, by the seizure and sale of the boat. They except to this suit and say that it cannot be maintained, as all the owners of the boat are not made parties, although the plaintiff knew who they were and has named them in his petition. The court overruled the exception because the defendants had not in it disclosed the names of all the partners. This the defendants say they were not bound to do, as the plaintiff had named different persons as being owners and was bound to join them in the action.

The judge of the District Court was correct in over-

ruling the exception, although the reasons he gave for it were not perhaps the best that could have been assigned. EASTERN DIS. January, 1841.

It has been held on various occasions that the owners of steamboats transporting passengers, produce and merchandise for hire were commercial partners, and, as such, jointly and severally bound for the debts that may be contracted on account of the boat.—4 La. Rep., 107.—13 idem, 281, and 14 idem, 491—303.—Each may therefore be sued for the debt and held responsible. During the existence of a partnership, all the partners may be sued in the parish where they conduct their business, although one or more of them may be domiciliated in a different one.—13 La. Rep., 424.—C. Pr., art. 165.—But we are not prepared to say after a partnership is dissolved, the partners could be so sued. It appears by the admission of the defendants, that this suit was instituted after the partnership was dissolved; we are therefore of opinion that the action can be maintained.

BLACK  
vs.  
SAVOY ET AL.

The owners of a steamboat transporting passengers and carrying merchandise for hire, are commercial partners and may be sued individually or a portion of them, for a debt due by the boat, without joining all the partners in the action.

After dissolution of the partnership the partners should be sued in the parish or place of their domicile, and only those residing in the same parish can be joined.

On the trial of the case, the plaintiff offered in evidence an account in detail, with an acknowledgment in writing at the foot thereof by J. H. King, captain of the boat and one of the owners, that it was correct, and also offered to prove by a witness that King had signed said acknowledgment in his presence, admitted the account to be just, that the articles were for the use of the boat, and expressed his regret he had not money to pay it. To this the defendants objected, saying the evidence was only secondary and not binding on them. The judge admitted the testimony and the defendants excepted; we think he did not err. Masters of steamboats are the agents of the owners in all matters relating to their management and purchasing necessary supplies, and contracts made or acknowledgments of indebtedness for such purposes by them, are binding on the owners.—14 La. Rep., 492.

The acknowledgment of masters of steamboats of the correctness of bills presented for supplies or other things furnished the boat, are binding on the owners.

The acknowledgment and promise to pay, was made be-

EASTERN Dis. fore the boat was sold, and the partnership was bound by  
January, 1841. the acts of one of the partners and the agent of all.

RILLIEUX'S  
HEIRS  
vs.  
SINGLETARY.

The judgment of the District Court is therefore affirmed  
 with costs.

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**RILLIEUX'S Heirs vs. SINGLETARY.**

APPEAL FROM THE COURT OF THE 8TH DISTRICT FOR THE PARISH OF

ST. TAMMANY, THE JUDGE THEREOF PRESIDING.

The certificate of the French Officers under the colonial government of Louisiana, that the plaintiff's ancestor was in possession of a certain tract of land, under a purchase from the Indians, &c. is not legal evidence of title, and is inadmissible as evidence in a petitory action.

The officers of the French government could only certify such records or documents as were deposited in their department, and such documents should be produced. If they certify of their personal knowledge, they should be sworn.

This is an action to recover a tract of land in the possession of the defendant.

The plaintiffs allege that their immediate ancestors, Vincent and Mary Tronguet Rillieux were in their lifetime possessed of a large tract of land in the parish of St. Tammany, bounded on the east by Pearl River, and on the south by the Bayou Bonfoucas, and on the north by a line drawn from the head of the last mentioned Bayou to Pearl River; that their remote ancestors possessed and owned this land since the year 1740, and have continued to enjoy the same from time under the authority and with the approbation and consent of the French, English, Spanish and American governments during the times they respectively held possession of the

country; that on the 16th March, 1765, their ancestors received a written title from the French authorities, a copy of which they annex to the petition. They allege they have possessed said tract of land for more than 30 years, and have acquired title thereto by prescription; that within a few years one Edward Singletary has entered on and took possession of about 500 superficial acres of said land without title, which he continues to hold and refuses to give it up; wherefore they pray judgment giving them the possession and declaring them to be the true owners of said land.

EASTERN DIST.  
January, 1841.

HILLIEUX'S  
HEIRS  
vs.  
SINGLETARY.

The defendant pleaded a general denial.

On the trial the plaintiffs offered in evidence the document annexed to their petition, which purports to be a title given the 16th March, 1765; by Charles Phillippe Aubrey, chevalier de l'ordre Royal et militaire de St. Louis, commandant pour le Roi en la Province de la Louisiane, et Denis Nicolas Foucault, faisant les fonctions d'ordonnateur et de premier Juge au conseil superieur de la Province, in which *they certify* that the ancestor of plaintiffs possessed the land in question, and had done so before the date of this certificate, and had purchased a portion of it from the Biloxi Indians, &c. This evidence or document was objected to by the defendant's counsel because said Aubrey and Foucault were not officers of that part of Louisiana, under the name of West Florida, &c. The court refused to receive it, in support of the allegations in the petition, although the plaintiffs offered parol evidence of their possession of said land, in conformity with said title; whereupon a bill of exception was taken. This was all the evidence offered. There was a judgment of non-suit and the plaintiffs appealed.

*Hennen*, for the plaintiffs and appellants.

*Ellis*, for the defendant.

*Martin J.* delivered the opinion of the court.

**EASTERN DIS.**  
*January, 1841.*

**RILLIEUX'S  
HEIRS  
vs.  
SINGLETARY.**

This is a petitory action; the plaintiffs sue to recover about 500 acres of land, (part of a larger tract) which they allege the defendant has taken into his possession and illegally detains from them. They claim to be the owners of the larger tract, of which the locus in quo forms a part, in virtue of a written title made in favor of their ancestor by Aubrey the French commandant of Louisiana in 1765, situated north of Lake Pontchartrain and west of Pearl River, in the parish of St. Tammany.

The defendant pleaded a general denial; and put the plaintiffs on strict proof of their demand.

The only evidence of the plaintiff's title consisted of a document which they call a grant, and which bears the signatures of Aubrey the French King's commandant, and of Foucault acting as ordonnateur in the province of Louisiana. The plaintiffs also claim title by the prescription of 30 years. The document offered as evidence of title, is simply the certificate of Aubrey and Foucault, who "certify to whomsoever it may belong, that Mrs. Marie Rene Chenet, widow of the late François Rillieux, has during 24 years been in the peaceable enjoyment and possession of a tract of land situated north of Lake Pontchartrain, between Bayou Bonfoucas and Pearl River; and that said tract of land, a great part whereof consists of muddy meadows (prairies tremblantes) altogether impracticable; being insufficient on account of the small quantity of pasture to be found in the pine land, she was in the necessity of purchasing in 1761, from the Biloxi Indians, all the practicable land, that said nation owned between that of the said Dame Rillieux and Pearl River, in order to get pasturage necessary for at least 100 cows in such manner, that all the land possessed by said Dame, &c., during 24 years, and that which she acquired from the Biloxi nation of Indians since the year 1761, as above stated, *form* now an inlet enclosed by the low and muddy lands on the borders of Lake Pontchartrain, the Bayou Bonfoucas and Pearl River. In

testimony whereof we have delivered the present certificate to the said Mrs. widow Rillieux to serve as the case may require. Given in the City of New-Orleans, with the seal of our arms and the counter signatures of our secretaries, the 16th March, 1765."

EASTERN DIS.  
January, 1841.

RILLIEUX'S  
HEIRS  
VS.  
SINGLETARY.

Signed "Aubrey" L. s.

" "Foucault" L. s.

Countersigned

"Soubie" L. s.

"Duvergé" L. s.

When this document was offered to be read in evidence the defendant's counsel objected to its admission on the ground that at the time it bears date, the *locus in quo* made no part of the former province of Louisiana, which had been ceded to Great Britain under the name of West Florida; being on the north side of Lake Pontchartrain. On this ground the document in question was rejected as evidence; although the plaintiff's counsel stated that he was prepared with parol evidence to prove the possession of their ancestor and themselves.

We are not ready to say that if this document was admissible before the cession, that it ceased to be so on account of that event. But it appears to us, that there is a stronger objection to its admissibility which is, that the French officers attest facts that do not appear to come within their official knowledge; at least it is not shown that they do. These officers speak of the possession of the plaintiff's ancestor, and of her purchase from a tribe of Indians. If the records of the department of either of them contained the evidence of such purchase it ought to have been stated; otherwise there is a violent presumption that they certified on their own personal knowledge. In such a case they should have been sworn. The document was therefore properly rejected.

The certificate of the French officers under the colonial government of Louisiana, that the plaintiff's ancestor was in possession of a certain tract of land, under a purchase from the Indians, &c. is not legal evidence of title, and is inadmissible as evidence in a petitory action.

It does not appear that the parol evidence referred to in the bill of exception was actually offered. The court did not therefore in our opinion err in refusing to admit said document in evidence on this ground. The refusal of the court to admit

The officers of the French government could only certify such records or documents as were deposited in their department, and such documents should be produced. If they certify of their personal knowledge, they should be sworn.



**EASTERN** Dis. this piece of evidence, was immediately followed by a judgment of non-suit.  
January, 1841.

**ERWIN ET AL**  
 vs.  
**BISSELL ET AL.**

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

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**ERWIN'S Heirs and Assigns vs. BISSELL et al.**

APPEAL FROM THE COURT OF THE FOURTH DISTRICT FOR THE PARISH OF  
 IBERVILLE, THE JUDGE OF THE DISTRICT PRESIDING.

A plea which states that a final settlement had taken place of *all accounts and transactions* between the parties at a certain period, is an admission which precludes the party making this plea, from claiming any balance *apparently due before that period.*

The judgment forms the authority of the thing adjudged upon all matters and demands set up in the pleadings.

This is an action to compel the defendants to compensate a judgment which the latter had obtained against Erwin's heirs, with one which it is alledged Erwin's heirs recovered against one Abram Wright, the first husband of Mrs. Bissell.

The plaintiffs allege they are the heirs and assignees of Joseph and Lavinia Erwin, deceased, and that their ancestor, Joseph Erwin, in 1824, obtained a judgment against Abram Wright, on which a balance remains due and unpaid of \$3344 86, with interest. That Ellen Davis, widow of A. Wright, deceased, and now wife of Frederick Bissell, and Ann E. Wright, Widow Lindsay, her daughter, are the sole heirs of Wright and have accepted his succession and are liable for his debts, That Bissell and wife have obtained a judgment on account of Wright's estate against them, which they pray may offset and be compensated by the one they hold against Wright's

heirs and estate. They also obtained an injunction to stay Bissell and wife's judgment until this suit could be tried.

EASTERN DIS.  
January, 1841.

The defendants pleaded a general denial; averred that they were in no way liable for the plaintiffs' demand; that said judgment set up as the basis of their demand had long since been paid, satisfied and extinguished; and particularly in the suit between these respondents and the heirs of Joseph Erwin, in which the judgment now sought to be extinguished by compensation was obtained; in which case all matters of indebtedness between said parties, that is to say, between the widow and heirs of A. Wright and the heirs of Joseph Erwin, which have been settled and compensated in said suit as shown by the pleadings therein. They further plead prescription, liquidation, settlement, payment and *res judicata*, and pray that this suit be dismissed.

ERWIN ET AL  
VS.  
BISSELL ET AL

The injunction suit of the plaintiffs was cumulated and tried with this one. The defendants prayed for the dissolution of the injunction with damages.

The records and judgments of the former suits between the parties were produced in evidence. The defendants relied on their plea of *res judicata*, that the demand now set up by the plaintiffs had been already settled, adjudicated upon and passed in *rem judicatam* in the suit, in which they recovered the judgment now sought to be compensated. It appears that in the suit of Bissell and wife against Erwin's heirs, in which the judgment now enjoined was recovered the defendants there, that is, Erwin's heirs, pleaded in defence, "that the plaintiffs in their capacities (as heirs of A. Wright) are justly indebted to them (the defendants as heirs of Joseph Erwin, deceased) in another and further sum of \$14,000, for this, to wit: that the said Joseph Erwin and the said Abram Wright having long and intricate accounts existing between them for several years, did on or about the year 1828, come to a complete settlement of all existing accounts and transactions by which it appeared said A.

**EASTERN DIS.** Wright fell indebted to the said Joseph Erwin in the said January, 1841.

**ERWIN ET AL**  
**VS.**  
**BISSELL ET AL.** sum, and which the said Wright then and there acknowledged to be justly due the said Erwin, &c." This plea was put in by Erwin's heirs among others in the suit in which Bissell and wife obtained their judgment of \$4000, now contested, and all the issues made up were passed upon by the jury and a verdict given for a balance of \$4000 due the heirs of Wright by Erwin's heirs on their warranty after settling all their accounts.

The judgment set up by Erwin's heirs in compensation, was obtained against Wright as far back as 1824.

The District Judge, however, was of opinion the old judgment had never been extinguished or paid, rendered judgment perpetuating the injunction and compensating the two judgments. The defendants appealed.

*Edwards & Winchester*, for the plaintiffs, contended that the moment Bissell and wife obtained their judgment against Erwin's heirs for \$4000, it was compensated by operation of law by the judgment the latter had obtained against A. Wright in his lifetime, and for which his widow and heir had become liable and bound to pay by accepting his succession. The two demands were of equal dignity, and compensation was the immediate effect and consequence as soon as the last judgment was rendered.

*Labauve*, for the defendants, insisted on the reversal of the judgment and dissolution of the injunction with damages. He relied on the plea of *res judicata*; that by the plea or answer to the Bissell suit, all demands whatever of Erwin's heirs against Bissell and wife were put in and at issue and passed on by the jury.

*Bullard, J.* delivered the opinion of the Court.

The heirs of Erwin commenced an action against the heirs of Wright to revive and make executory against them a

judgment alledged to have been recovered in 1824 by Er-  
win against Wright, the ancestors of the respective parties.

EASTERN DIS.  
January, 1841.

Pending that suit execution issued on a judgment recovered  
by the defendants, now known as Bissell and wife, against  
the heirs of Erwin for \$4000 in an action of warranty.—

ERWIN ET AL  
vs.

BISSELL ET AL.

(See 15 La. Rep., —.)—Thereupon the plaintiffs obtained an  
injunction on the allegation that the two judgments, being  
between the same parties, were both extinguished by com-  
pensation. The two suits were cumulated and tried together,  
and the injunction having been made perpetual, the de-  
fendants appealed.

The defence principally relied on, in the court below as  
well as here, is, that in the case of Bissell and wife *vs.*  
the heirs of Erwin in warranty, the latter had averred in  
their plea to the action, that a final settlement had taken  
place between Erwin and Wright in 1828 of all their mo-  
ney transactions, which resulted in a balance due the for-  
mer of \$14,000, which was claimed in reconvention.

On recurring to the record in the case of Bissell and  
wife *vs.* the heirs of Erwin, we find the following plea or  
exceptions: "And the defendants would further allege and  
avow that the plaintiffs, in their capacities above mentioned,  
are justly indebted to the defendants, as heirs, &c., of the  
late Joseph Erwin in another and further sum of \$14,000,  
in this, to wit: that the said Joseph Erwin and the said  
Abram Wright having long and intricate accounts existing  
between them for several years, did on or about the 25th  
day of November, 1828, come to a complete and final  
settlement of all their previously existing *accounts and tran-*  
*sactions*, by which it appeared that the said Abram Wright  
fell indebted to the said Joseph Erwin in the said sum,  
and which the said Wright then and there acknowledged  
to be justly due to the said Erwin."—They conclude by  
praying judgment against the heirs of Wright for the said  
sum of \$14,000, as well as for other sums.

EASTERN DIS. The court below treated this merely as a plea of *res*  
January, 1841. *judicata* and did not consider it as sustained by the exhi-

ERWIN ET AL  
vs.  
BISSELL ET AL. bition of the record in the case of Bissell and wife *vs.* the  
 heirs of Erwin. We are of opinion, however, that whether  
 the plea of *res judicata* ought or ought not to have been

A plea which states that a final settlement had taken place of all accounts and transactions between the parties at a certain period, is an admission which precludes the party making this plea from claiming any balance apparently due before that period.

sustained, and whether the judgment in the case of Bissell and wife *vs.* the heirs of Erwin adjudicated finally upon all accounts between the parties or not, that the plea in which it is averred that a final settlement had taken place in 1828, was an admission which precludes the heirs of Erwin from claiming the balance apparently due on the judgment of 1824. The terms of the plea are general and embrace *all accounts and transactions* between the parties down to the period of the settlement. The balance due on the judgment of 1824, must therefore have been merged in the balance of \$14,000, found due upon settlement.

But it appears to us that the demand in reconvention formed a part of the issue submitted to the jury, and the verdict being for \$4000 in favor of Bissell and wife, negatived that demand. Admitting that it might have been assigned as error that the jury took no notice of the recon-

The judgment forms the authority of the thing adjudged upon all matters and demands set up in the pleadings.

vention, yet no objection was made to the form of the verdict on the appeal, and in our opinion the judgment forms the authority of the thing adjudged, upon all the matters and demands set up in the pleadings.

The judgment of the District Court is therefore reversed and ours is that the injunction be dissolved and that the defendants recover of the plaintiffs ten per cent. damages, and costs in both courts.

**MELANCON vs. ROBICHAUX.**EASTERN DIS.  
January, 1841.

APPEAL FROM THE COURT OF THE 2ND DISTRICT, FOR THE PARISH OF

LAFOURCHE INTERIOR, THE JUDGE OF THE FOURTH

**MELANCON**  
**vs.**  
**ROBICHAUX.**

DISTRICT PRESIDING.

Whatever respect may be entertained for the verdict of a jury, the court will disregard it, when the evidence is conclusive in opposition to it.

Where the thing sold turns out to be so defective, that had the defects been made known to the purchaser, he would not have bought, the sale will be rescinded.

Even if the warranty is excluded the seller is bound to disclose the defects or vices of the thing sold, to the buyer.

This is an action for the rescission of a sale of a Flat Boat, fitted up to be used as a floating ball room, on the bayou Lafourche and the Mississippi river.

The plaintiff alleges that he contracted with the defendant for a Flat Boat fitted up so as to be used for a ball room, and to be delivered to him at his domicil in the parish of Ascension, and for which he was to give seven hundred dollars. That on the first of July, 1839, the said boat was delivered, and represented by the defendant to be in good order and free from leakage; but that on the next morning it had leaked to such a degree that there was 10 inches water in it; and it was found to continue leaking so as to render it unfit for use, and so dangerous as to endanger the lives of all who ventured in it by sinking. The plaintiff further alleges that the defendant fraudulently concealed the defects, with a view to defraud and cheat him; that the defects render the boat so inconvenient and useless that had he known them he would not have purchased; and he has twice tendered it to the defendant and demanded the rescission of the sale and return of his notes, which he refused. He prays judgment rescinding the sale and compelling the defendant to return him his notes given for the price, &c.

The defendant pleaded the general issue, and denied specially that there was any fraud, concealment or deceit, or that



**EASTERN DIS.** there was any hidden defect or vice; but on the contrary the plaintiff had a perfect knowledge of the boat and caused it to

**January, 1841.**

**MELANÇON**

**vs.**

**ROBICHAUX.**

be thoroughly examined when he received it, and expressed his conviction of its soundness; that the boat was sold without warranty, and expressly with the understanding that it was to be received by the buyer upon his own examination.

Upon these pleadings and issues the cause was tried before the court and jury.

The testimony of the witnesses was somewhat contradictory. It appeared that the boat was taken up to the parish of Ascension after its preparation where it was delivered. That it commenced leaking so as to make it entirely useless, and was abandoned to the seller; he being twice notified to receive it back and return the price.

The suit was instituted at the defendant's domicile in the parish of Lafourche, witnesses were called from the vicinity of the defendant's residence, who only saw the boat before it was delivered and testified differently from those whose depositions were taken in Ascension and who saw the boat at and after its delivery. It was clearly shown however that the boat was leaky and almost worthless.

The jury, from all the evidence returned a verdict for the defendant, and from judgment rendered thereon the plaintiff appealed.

*Miles Taylor* for the plaintiff.

*Thibodeaux and Boucherville* for defendant.

*Morphy J.* delivered the opinion of the court.

This action is brought to annul the sale of a flat-boat fitted up to be used as a ball-room, on the ground that at or before the time of the sale it had defects known to defendant, which he fraudulently concealed from the plaintiff. The petition charges that before purchasing, the plaintiff informed defendant that he would not buy the flat-boat if

it leaked; and that defendant represented the boat to be sound and in good order; and showing him that the pump would not draw, assured the plaintiff that the boat had not been pumped for six days; that on or about the 1st of July, 1839, the boat was delivered to the plaintiff at his domicile in Assumption, and there was then no water in it; but that the very next morning it had leaked so much that the water in the hold exceeded ten inches in depth; that at the time of the purchase the boat was so leaky that it was of little value and its use as a ball room was thereby rendered extremely inconvenient and imperfect; that said defect was fraudulently concealed, and the boat falsely represented to be in good order by defendant, with a view to deceive the plaintiff in the purchase; that soon after he discovered such defect and fraud, he (plaintiff,) offered to return the boat and cancel the sale, but that defendant refused to receive the boat or return the price. The answer denies all fraud or deceit, and avers that the plaintiff had as perfect a knowledge of the boat as defendant himself; having on the day of the sale made a more thorough examination of her than he (defendant) ever did, and expressed his satisfaction as to her soundness; that moreover the defendant never warranted the boat in any manner, but sold it with the express understanding that the buyer was to receive it on his own examination and without any warranty. The case was laid before a jury who brought in a verdict for the defendant; after a fruitless attempt to obtain a new trial, the plaintiff appealed.

Had all the witnesses examined in this case appeared before the jury and been residents of the parish where the trial took place, we would not perhaps have disturbed this verdict; we would have considered that those parts of the testimony which had created in our minds a strong conviction of its incorrectness, were disbelieved by the jury from a personal knowledge of the witnesses; but in this case all the evidence adduced by the plaintiff was taken

EASTERN Dis.  
January, 1841.

MELANSON  
vs.  
BOBICHAUX.

EASTERN DIS.  
January, 1841.

MELANÇON  
vs.  
ROBICHAUX.

under a commission directed to, and executed in, the parish of Ascension. The most important and material part of it seems to have been entirely overlooked by the jury. They appear to have based their verdict wholly on the testimony of the witnesses of their own parish who were brought before them. Giving to these witnesses the fullest credit, they establish that before purchasing plaintiff examined the boat and expressed himself satisfied with its condition, and that even after the sale he appeared to consider his bargain a good one. They do not state that the boat was sold without a warranty but only infer that there was none in the sale because they heard nothing said about it. As to the condition of the boat, they agree with the plaintiff's witnesses that it was leaky; although there is some variance between them as to the extent of the leakage; they further state that the defendant used the boat and gave several balls on board before she sunk. All this may be true and does not absolutely conflict with the statements made by the plaintiff's witnesses. Hyppolite Guilfaut, one of them, says, that a few days before the sale Robichaux requested witness to say nothing of the leaky condition of the boat, because he was about selling her to Melançon; that witness told him that he ought not to cheat the plaintiff and put the lives of the women and children in danger, to which defendant replied that he did not care, provided he got his money. *Martinez*, a witness present when the bargain was made, says, that the defendant represented the boat to be in good order; that Melançon told him that he would not buy the boat if it leaked; Robichaux answered that he had nothing to fear on that score. Another witness states that he visited the boat soon after the delivery to plaintiff; it leaked very badly, and it was worth a dollar and a half a day to pump her out; that four or five days after the sale, Melançon finding the boat so leaky offered Robichaux to take her back; he even offered the defendant fifty dollars to annul the sale,

*Morgan*

and Robichaux refused saying he would not do it for three hundred dollars; that far from expressing any satisfaction at his bargain, Melançon complained to witness that he had been deceived. Trasimond Trachant, a carpenter by trade, says that a few days after the sale he visited the boat; it leaked considerably, he thinks about ten inches every twenty-four hours; it was worth at least a dollar per day to pump her clear of the leakage; that at plaintiff's request he examined the boat and found her very rotten. Charles Champagne, one of defendant's own witnesses, testifies that the day after the arrival of the boat he and his brother pumped out five or six inches of water; that on the Sunday following witness hired two negroes to pump the boat; there was then nine or ten inches of water in the hold, although she had been pumped the day before by witness and his brother. With such testimony before us, whatever may be in general our respect for the verdicts of juries, we cannot surrender up to them the convictions of our minds. It is clear from the whole evidence that the flat-boat leaked in such a manner as to make its use as a ball-room so inconvenient and imperfect that the plaintiff would not have purchased had he known this defect to exist. We cannot doubt that the defendant knew this defect, but even if he did not, yet he would be bound to restore the price.—La. Code, 2496, 2508, 2509—1 La. Rep., 310—1 Martin's N. S., 312.—The examination so much spoken of was made after the defendant's declarations as to the soundness and good condition of the boat; and was perhaps less strict in consequence of such declarations. There is no evidence that warranty was excluded. But if there was, the defendant being aware of the defect was bound to disclose it; as to the balls given in the boat, the plaintiff was entitled to use it agreeably to its destination; after defendant's refusal to take it back, if he did so use it, his right to the redhibitory action was not thereby prejudiced; and this suit was brought several months before the flat-boat was lost.—La. Code, art. 2511.

EASTERN DIS.  
January, 1841.

MELANÇON  
VS.  
ROBICHAUX.

Whatever respect may be entertained for the verdict of a jury, the court will disregard it, when the evidence is conclusive in opposition to it.

Where the thing sold turns out to be so defective, that had the defects been made known to the purchaser, he would not have bought, the sale will be rescinded.

Even if the warranty is excluded the seller is bound to disclose the defects or vices of the thing sold, to the buyer.

**EASTERN Dis.** It is therefore ordered that the judgment of the District  
**January, 1841.** Court be reversed, and proceeding to give such judgment as,  
**ORILLION** in our opinion, ought to have been rendered below; it is or-  
**vs.** dered and adjudged that the said sale be cancelled and an-  
**SLACK.** nulled, and defendant do deliver up to plaintiff, the two notes  
described in the petition as given for the price of said flat-  
boat, or in default thereof, do pay their amount, to wit: \$700,  
with costs in both courts.

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**ORILLION vs. SLACK.**

**APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT FOR THE  
PARISH OF IBERVILLE.**

Where the principal demand is evidently fictitious, designed to give jurisdiction to this court, the appeal will be dismissed.

This court will not encourage attempts to evade the provisions of the Constitution, limiting its jurisdiction.

This is an action to recover a bull, which the plaintiff alleges belongs to him, but that the defendant has illegally taken him into his possession and detains him, although he has made amicable demand of him. He further states that said bull is worth one hundred dollars, and that his use and profits and hire are worth fifty cents per day. That since the detention of said bull by the defendant he has had no bull to breed with his cows, and that he will loose the ordinary produce and increase of his cows, and suffer damages in consequence thereof to the amount of five hundred dollars. He prays for judgment requiring the defendant to deliver up to him said bull, together with fifty cents per

day for every day he has had him in possession, and five hundred dollars in damages. EASTERN Dis.  
January, 1841.

The defendant pleaded the general issue; and averred that he was the lawful owner of the bull claimed and described in the petition; and that all claim for damages was prescribed.

On these pleadings and issues the parties went to trial before the court and a jury,

The plaintiff proved ownership of the bull to the satisfaction of the jury, who returned a verdict restoring him the bull with ten dollars as damages. The plaintiff entered a *remittitur* of the damages and had judgment for the bull, from which the defendant appealed.

*Labauve*, for the plaintiff, prayed the affirmance of the judgment.

*G. B. Taylor*, for the defendant, urged the reversal of the judgment on the ground that there was no proof of either property or possession of the bull by the plaintiff, and that the defendant had been in possession eighteen months previous to the suit using him as his own. He who seeks to reclaim must establish his right to the property'—*La. Code, art. 3417*.

*Bullard, J.* delivered the opinion of the court.

This is an action to recover possession of a bull alledged to be the property of the plaintiff, and who alleges further that the use and proffit and hire of the bull is worth fifty cents per day—that he has sustained damages to the amount of five hundred dollars, and that the bull is worth one hundred dollars. There was a verdict for the restoration of the bull, and ten dollars damages. The plaintiff remitted the damages and judgment being rendered for the bull the defendant appealed.

The counsel for the appellant has argued that the demand

ORILLION  
VS.  
SLACK.



**EASTERN DIS.** for heavy damages, independantly of the hire and the value of  
**January, 1841.** the bull is evidently fictitious and for the mere purpose of

**JACOBS,** giving jurisdiction to this court in case of appeal. The  
**TUTRIX, &c.** petition does not state on what ground damages are claimed  
**vs.** besides the value of his hire, and it is manifestly absurd  
**TRICOU ET AL.**

Where the principal demand is evidently fictitious, designed to give jurisdiction to this court, the appeal will be dismissed.

This court will not encourage attempts to evade the provisions of the constitution, limiting its jurisdiction.

It is therefore ordered that the appeal be dismissed with costs.

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**JACOBS, Tutrix, &c., vs. TRICOU et al.**

**APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF  
 NEW ORLEANS.**

A succession in the possession of the widow and tutrix of the minor children, owing debts must be administered as an entire thing for the advantage of the creditors, as well as beneficiary heirs entitled to the residue, after payment of the debts, and the law requires in all such cases that an administrator shall be appointed who must give security.

So a tutrix cannot administer a succession in virtue of her office as tutrix of the minor heirs, without giving good security as is required of other administrators.

This case arises on an application of the widow of Manis

Jacobs, deceased, to be confirmed in her office of natural tutrix of her minor children, and as such to have the entire administration of her deceased husband's succession without giving any security.

EASTERN DIS.  
January, 1841.

JACOBS,  
TUTRIX, &C.  
VS.  
TRICOU ET AL.

The plaintiff alleges that her husband died leaving three children, two of whom are minors, and that he has left considerable property consisting of lands, houses and lots, and slaves; that she has some separate or paraphernal property, and mortgages on said succession for the restitution of other dotal property which came into the possession of her husband.

She prays to be confirmed in her office of natural tutrix to her minor children, and that B. Hart, who married the oldest daughter, be appointed under tutor; that she be empowered to administer the estate of her deceased husband as tutrix, &c., and that an inventory of the succession be made, as also a separate inventory be made of her own property, and that she be put in possession of said succession with all the necessary orders and authority to administer the same.

The Judge of Probates granted the prayer of the petitioner.

The plaintiff proceeded to sell property and do other acts of administration and presented a provisional tableau of distribution and an account of her administration, with a prayer for its homologation, and that she be authorised to raise all mortgages on the property of the succession which has been sold, and that she have power to compel the purchasers to comply with their purchases.

Several oppositions now came in to the homologation of the account. First of all, Tricou, President of the Company of Architects, made opposition, averring that said Company had the vendor's privilege on a lot of ground sold by them to the deceased, on which there was a large balance due; and that the widow had failed to comply with an arrangement made

**EASTERN** Dis. with her for the payment of said debt. He objected to several items in her account, and specially averred that she was not entitled to administer said succession, or to the fees and commissions as administratrix, never having been appointed or given security. That no steps can be taken in the administration of the estate, until an appointment should be made; he prayed to be appointed such administrator.

**JACOBS,  
TUTRIX, &c.  
vs.  
TRICOU ET AL.**

Next came C. M. Staës and made opposition, averring that he was a creditor. He objected to various items in the account and especially denied her right or authority to administer. He prayed that her account be rejected, and that he be appointed administrator. There was some further opposition to items in the account and applications to amend the tableau, which it is unnecessary to specify.

Upon these pleadings and issues the cause was tried. The facts material in understanding and deciding the case are all stated in the pleadings.

There was judgment amending the tableau and confirming it as amended; and requiring the plaintiff to give satisfactory security within ten days for the faithful administration of the estate of her deceased husband; and on failing to do so, that Tricou and Staës be appointed joint administrators. The plaintiff appealed.

*Preston & Greiner*, for the appellant.

*J. Seghers*, for the appellee.

*Morphy, J.* delivered the opinion of the Court.

The late Manis Jacobs left two minor children and a daughter of full age married to one B. Hart; his widow, Angelique Verneuille, qualified as natural tutrix of the two minors, and began to administer on the estate. She caused inventories to be made, and with the advice and consent of a family meeting obtained an order for the sale of the property left by the deceased. This order was granted on a suggestion that the

estate was burthened with numerous debts ; among which there were several judgments, and that there were no available means to pay said debts or any portion thereof. After the sales were made at auction, the tutrix having given no security to administer on the estate, the Recorder of Mortgages refused to raise the mortgages existing on the property sold. The tutrix then applied for relief to the Court of Probates and filed a provisional tableau or account, showing the general charges against the estate, and the privileges and mortgages ; no part of the proceeds of the sales had then been received, because the purchasers refused to pay unless a clear title could be made to them ; her object was to obtain the homologation of this account and with it a decree raising all the mortgages on the property sold.

EASTERN DIS.  
January, 1841.

JACOBS,  
TUTRIX, &c.  
vs.  
TRICOU ET AL.

Three oppositions were successively filed by Tricou, as President of the Company of Architects, by Staës, and by B. Hart. After objecting to divers expenses and charges, two of the opposing creditors, Tricou and Staës, contended that the whole account should be rejected as informal and leading to no result whatever, because there was nothing to be distributed, no sales having been passed and no notes or money received. They denied moreover that the tutrix had any right to administer on the estate, which had been accepted with benefit of inventory, because she had received no appointment from the court to that effect, and had given no security whatever. They prayed to be themselves appointed administrators upon their complying with the requisites of the law. The Judge below decreed that the tutrix should be allowed ten days to give security agreeably to article 1041 of the Louisiana Code and, in default of her furnishing such security, that the said Tricou and Staës should be appointed administrators of the estate. The tutrix appealed.

As to the several items objected to in the provisional account filed by the tutrix, the testimony, we think, justifies the decision made on them by the Judge below ; we shall there-

EASTERN DIS.  
January, 1841.

JACOBS,  
TUTRIX, &c.  
vs.  
TRICOU ET AL.

fore pass on to the consideration of the principal question in this case; it is whether this tutrix has the right which she claims of administering without being bound to give security, as all other administrators. In support of this pretension, her counsel has referred us to the opinion expressed in *Erwin vs. Orillon*, 6 La. Rep., 213. In that case the only point at issue was whether in suits brought by the heirs of age, and the tutors of the minor heirs, an exception can be taken to their capacity to sue, on the ground that the estate having been accepted with benefit of inventory, an administrator should have been appointed. We have more than once had occasion to remark that the reasoning of Courts of Justice, in pronouncing on the controversies which come before them, should always be considered and understood in reference to the point submitted for their decision and should not be extended to cases presenting questions quite different. In the opinion alluded to, no positive or absolute right to administer the whole estate was recognized in the tutor of the minor heirs, as the appellant's counsel seems to imagine; it was said (no doubt in relation to estates perfectly solvent) that where heirs of age are united with co-heirs, who are minors and consequently under the protection of a tutor, the most reasonable and beneficial course was to leave a succession thus situated to the administration of the tutor until partition; where such a course is adopted, third persons, not being creditors, have no right to object to it. This is a controversy between the tutrix and the creditors of the estate, who disputed her right to administer. Upon an attentive perusal of those articles of the Louisiana Code which treat of the appointment of administrators to estates accepted with benefit of inventory, we can see no ground whatever on which to rest the claim made for the tutrix in this case.—La. Code, articles from 1034 to 1041. In regulating the manner of appointing administrators in such cases the Code provides that the Judge must give the preference to the beneficiary heirs of age, if there be any in the State, over every other person, but that if all the

beneficiary heirs are minors, this preference can be claimed by their tutors, under the charge of being personally liable for their acts of administration and *giving security*, even though these tutors should be the father or mother of the minors. The articles 327 and following which are supposed to conflict with those above quoted, provide for the administration only of the separate and exclusive property of minors, in which no other persons but them have an interest, but when, as in this case, a succession burthened with debts is to be settled, which may or may not leave a balance to be distributed among the beneficiary heirs, we are totally at a loss to conceive why a right to administer, and still less, an exemption from the obligation to give security, should exist in favor of the natural tutrix of some of the minor heirs. A succession thus situated must be administered as an entire thing for the advantage of the creditors as well as of the beneficiary heirs entitled to the residue left after the payment of the debts; hence the law requires in all such cases the appointment of an administrator and provides that good security must be given.

EASTERN DIS.  
January, 1841.

JACOBS,  
TUTRIX, &c.  
VS.  
TRICOU ET AL.

A succession in the possession of the widow and tutrix of the minor children, owing debts, must be administered as an entire thing for the advantage of the creditors as well as beneficiary heirs, entitled to the residue after payment of the debts, and the law requires in all such cases that an administrator shall be appointed, who must give security.

But it is further contended that if the tutrix is bound to give security, it can be exacted only for the amount of the claims of those creditors who require it, and we are referred to the act of the 25th March, 1828, p. 156, sec. 15. On examination, we are of opinion that this law has no bearing on the subject before us. It relates to the security which might be required of the heirs themselves when they demand and obtain possession of the effects of a succession, after it has been administered upon, and when there are pending claims against such succession; but in cases like the present the amount of the security to be given is fixed by article 1041 in terms too explicit to be disregarded. As to the trouble, expense and difficulties which the appellant's counsel apprehends, would be the result of the appointment of another administrator, in case the tutrix cannot give the security required of her, we are not aware that such considerations should prevent us from declaring in

So a tutrix cannot administer a succession in virtue of her office as tutrix of the minor heirs, without giving good security as is required of other administrators.



EASTERN DIS.  
January, 1841.

JACOBS,  
TUTRIX &c.  
vs  
TRICOU ET AL.

any case what the law is on a submitted question ; such consequences, if they were necessarily to follow, would at all events be attributable to the unadvised course that has been pursued. But such fears need not, we think be entertained ; all that has hitherto been done, was so done by order and under the sanction of the Court. A new administrator would take the succession in its actual state and proceed to its settlement. Such, we believe to be the law of this and every civilized country ; the contrary doctrine would be destructive of the good order of society and of the faith due to judicial proceedings.—*Sterlin's executor vs. Gros*, 5 La. Rep. 100—3 Duranton, p. 471, No. 479.

As to that portion of the judgment appointing Tricou & Staës as administrators, we find nothing in the record to justify such appointment. Tricou does not appear to be a creditor of the estate ; he made opposition in the name and on behalf, of the Company of Architects, to whom the deceased was indebted, and Staës has offered no evidence whatever of any claim on the estate.

It is therefore ordered that the judgment of the Court of Probates be affirmed, except so far as relates to the appointment of Tricou and Staës ; which is hereby annulled ; and it is further ordered that this case be remanded for further proceedings ; the appellees to pay the cost of this appeal.

**DESORMES' Heirs vs. DESORMES' Syndic.**EASTERN Dis.  
January, 1841.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF

POINTE COUFEE,

DESORMES'  
HEIRS  
vs.  
DESORMES'  
SYNDIC.

Under the act of the 20th March, 1839, "amending the Code of Practice," errors and irregularities in taking up an appeal will be cured by allowing time, when not occasioned by the fault of the appellant.

The 1042d article of the Code of Practice directs the testimony of witnesses in causes tried before the court of probates to be taken down in writing by the Judge, and annexed to the record; also a list of the documents filed by the parties that they may be read on the appeal; and when this is not done, the case will be remanded at the cost of the appellee.

This case was before this court at March term, 1840, and remanded to enquire into the heirship and authority of Paulin and Laurent Desormes, to appear in the suit for the settlement of the succession of their deceased father Jean Baptiste Desormes. See 15 La. Reports, 16.

On the return of the case to the court of probates, these parties, to wit: Paulin and Laurent Desormes appeared and expressed their readiness to prove that they were the legitimate children and sole heirs of J. B. Desormes, deceased, and took a rule on B. Poydras de la Lande, who had been appointed syndic of the alledged insolvent succession of their father, to show cause within ten days why they should not be recognized as heirs and entitled to prosecute this appeal.

The syndic admitted the heirship of the plaintiffs and their right to join in the proceedings and prosecute the appeal.

On these pleadings and issue the Judge of Probates ordered that the plaintiffs be admitted and recognized as heirs; and as such to proceed in the appeal, and that the syndic pay the costs of this proceeding; being the cause of them, and not denying the plaintiff's right when called upon to show cause, &c.

The Probate Judge certifies that the record contains a true transcript of all the documents and papers on file and proceedings had on the return of the case from the Supreme court.

**EASTERN DIS.** The plaintiffs then took up and prosecuted the appeal on the  
**January, 1841.** merits.

**DESORMES'**  
**HEIRS**  
**VS.**  
**DESORMES'**  
**SYNDIC.**

*Turner*, for the plaintiffs, urged the reversal of the judgment. —He insisted that the plaintiffs should be permitted to proceed with the appeal and have the judgment reversed. It was rendered without any notice or citation, or in fact, not contradictorily with any party defendant, or having an interest in the case. The syndic simply presented an account, with a petition, praying that after publication of notice according to law his account might be homologated and a discharge granted to him from all further liability. The attorney for absent heirs should have been made a party to defend the interest of the heirs.—C. Pr., 99, 100, 171.—9 La. Rep., 284.

2. The judgment homologating the account was rendered without a trial, and without proof of the several items, which were unsupported by vouchers. If any testimony in support of any of the items was given, it was not taken down by the Judge and annexed to the record; nor was any vouchers exhibited, which is required in all cases.—C. Pr., 1042—5 Martin's N. S., 102.

3. The whole proceedings present a mass of errors, and proceedings *ex parte*, and show such gross injustice to the parties interested not represented in Court, as to authorise the judgment to be reversed and the case remanded for a new trial. There is a case directly in point, in which from the neglect and improper conduct of the defensor to a suit, where absentees were interested, the judgment was set aside and the case remanded.—See case of *Collins vs. Pease's heirs*, decided in June, 1827, and never reported or published.

[The Reporter takes this occasion to report and publish the case above referred to as a sort of appendix to the present one.]

*Janin*, for the syndic and appellee insisted that the judgment should be corrected, so as to allow the defendant his costs.

The syndic of an estate, administered as an insolvent one, cannot be mulcted in costs, if he puts the persons who claim as heirs on proof of their capacity. It is the court of probates and not the administrator of the estate who recognizes the heir, and the costs must be born by the estate.

EASTERN DIS.  
January, 1841.

DESORMES'  
HEIRS  
VS.  
DESORMES'  
SYNDIC.

2. The appeal being again before the court and the interest of the appellant no longer disputed, the appellee renews his motion for dismissal on the grounds heretofore stated, and printed. See 15 La. Rep. 16.

3. But if the appeal is maintained, the appellee admits there is an error in the account homologated by the court which he considers himself bound to correct; and this he will do, whether the appeal be dismissed or not. It happened in his absence, by the person who had charge of his papers and who presented the account, &c. which he now explains.

4. If the appeal is not dismissed, the case should not be remanded; but the judgment of the court of probates should be amended, by making the balance in the syndic's hands \$1,180 95, from which is to be deducted the sum of \$505 16, allowed to two opposing creditors, together with the costs of these oppositions. This is the only error to be corrected, which is apparent on the face of the record; and being a matter of calculation it may be easily corrected. Nothing but errors apparent on the face of the record can be noticed, for the record is not certified as containing all the evidence.

*Garland J.* delivered the opinion of the court.

From the pleadings in this case, such evidence as is in the record and the points filed by the parties, we are enabled to learn generally, that Jean Baptiste Desormes died in the month of March, 1833, leaving a widow and two minor children to inherit a succession, which at the time was considered insolvent. The widow renounced all interest in the community, reserving her dotal and paraphernal claims, and as the tutrix of her minor children made an entire renunciation

**EASTERN DIS.** of the succession. A meeting of the creditors it is said, was  
*January, 1841.* held and Benjamin Poydras de Lalande and Guy Richard

**DESORMES'**  
**HEIRS**  
**VS.**  
**DESORMES'**  
**SYNDIC.**

appointed syndics, according to the 8th section of the act of the 29th March, 1826.—Moreau's Dig. vol. 2, p. 439. The latter died soon after, and the former administered the estate alone. He had the property sold, collected the proceeds and alleges he has paid a large amount of debts. It does not appear he ever made any list of the creditors or classification of the debts owing by the succession, or obtained any authority to pay them, but proceeded to act on his own responsibility in the liquidation. Finally, in the month of July, in the year 1838, Mr. Charles Poydras as attorney for Benjamin Poydras presented a petition to the court of probates with an account of his administration of the estate, representing he had collected and paid large sums of money, and showing a balance in favor of the succession. He does not state in what particular capacity he acts, but prays all persons may be duly notified, the account homologated, and he discharged from further responsibility. To this prayer the widow of Desormes made opposition, alledging all her claims had not been allowed and paid, as also did a creditor named Jewell. Their claims were examined and allowed to some extent, and a final judgment rendered homologating the account, settling the balance and discharging Poydras. Upon the rendition of this judgment, Jean Baptiste alias Paulin Desormes who had arrived at the age of majority, and Michel Olinde under tutor of Laurent Desormes, presented their petition to the probate court, alledging their interest as heirs and praying an appeal from the judgment, as they were injured by it. This appeal the Judge made returnable the fourth Monday in September, 1839, but subsequently made a new order, ordering it to be returned on the fourth Monday of November in the same year. When the appeal was filed the counsel of Poydras denied the appellants were heirs or had any pecuniary interest and also moved to dismiss it on various grounds.

To try the first issue, the cause was remanded to the probate court. 15 La. Rep. 16.—In which, when it came up for trial, it was admitted the appellants were the children and heirs; and that fact has been certified to us. The appellee again presses his motion to dismiss the appeal, and refers us to various authorities in support of his motion. It is sufficient for us to say, the cases cited were decided previous to the act of the Legislature of March 20th, 1839, amending the Code of Practice, the 19th section of which cures the defects alledged, and if it does not, it compels us to give the parties time to remove the objections. The appeal is therefore maintained.

On the merits, it is impossible for us to determine the case in the present condition of the record. It is evident only a portion of the evidence upon which the probate court acted, has been sent up. There is no evidence of the amount of the estate, of the debts paid, their validity or of scarcely any other matter which will enable us to come to a correct conclusion. There are manifest errors on the face of the papers one of which the appellee admits and expresses a willingness to correct; the appellants alledge there are others, but of their precise character we have not the means of correct information and can form no conclusions. Most of the proceedings have been very irregular and confused, and the Judge of probates who tried the cause in the first instance, has decided it without evidence, or has not complied with the imperative requisitions of the article 1042 of the Code of Practice, which directs the testimony of witnesses in causes before the court of probates, to be taken in writing and annexed to the record, also a list of the documents filed by the parties that they may be read on the appeal. We find this article so clear and directory, that we refused to dismiss an appeal in the Western District at the October Term upon the record coming up without a statement of facts, as it was the duty of the Judge to have preserved all the testimony adduced

EASTERN DIST.  
January, 1841.

DESORMES'  
HEIRS  
vs.  
DESORMES'  
SYNDIC.

Under the act of the 20th March, 1839, "amending the Code of Practice," errors & irregularities in taking up an appeal will be cured by allowing time, when not occasioned by the fault of the appellant.

The 1042d article of the Code of Practice directs the testimony of witnesses in causes tried before the court of probates to be taken down in writing by the Judge, and annexed to the record; also a list of the documents filed by the parties that they may be read on the appeal; and when this is not done, the case will be remanded at the cost of the appellee.



**EASTERN DIS.** by the parties and sent it up with the appeal. We remanded that cause for a new trial, and we feel confident that in this case, the ends of justice require us to exercise the discretion vested in the court by article 906 of the Code of Practice.

**COLLINS  
vs.  
PEASE'S HEIRS.**

It is therefore ordered and decreed, that the judgment of the court of probates homologating the account presented by the syndic of the estate of Jean Baptiste Desormes, be annulled and reversed and this case remanded for the purpose of liquidating and fixing precisely all the demands and claims of the syndic or others against the succession, the amounts received and paid by him, or remaining unpaid and to be proceeded in relation to all other matters according to law, the appellee paying the costs of this appeal.

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[Appendix to the preceding case of Desormes' heirs vs. Desormes' syndic.]

**COLLINS vs. PEASE'S HEIRS.\***

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF WEST FELICIANA.

An attorney for absent heirs, or a defensor appointed by the court to defend the rights of absentees in a suit against them ought not to be permitted to surrender any lawful means of defence on their part, to the injury of those he represents.

And where from want of skill or inexcusable negligence on the part of a defensor, by consenting to the introduction of improper testimony in favor of the adverse party, &c., it will form a proper case for the application of the law, authorising this court to remand causes to be tried *de novo*, when in its opinion *justice* requires such a measure.

In this case, Collins had been curator of the vacant estate of Gamaliel Pease, deceased, and while it was in a course of administration, he presented a claim of his own in his own

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\*This case was decided at the June term, 1827, and omitted in Martin's Reports. The court was then composed of Judges Mathews, Martin, and Porter. The case is now published for the first time.

right, and sued to recover it contradictorily with the attorney appointed to represent the absent heirs.

EASTERN Dis.  
January, 1841.

The attorney pleaded a general denial and put the plaintiff on strict proof of his demand; and he further pleaded payment and prayed that the demand be rejected.

COLLINS  
vs.  
PEASE'S HEIRS.

On the trial the plaintiff offered as evidence of his claim several depositions, which were allowed to be read without objection. No evidence was offered or defence made on the part of the defendants who were absentees. There was a judgment for the plaintiff, allowing the principal part of his demand, and the attorney for absent heirs appealed.

*McCaleb*, for the plaintiff and appellee.

*Watts and Lobdell* for the appellant.

*Mathews J.* delivered the opinion of the court.

This is a case in which a curafor appointed to the estate of the deceased, as being vacant, caused proceedings to be commenced against the absent heirs, for the recovery of claims which he alleged to hold in his own right. A defensor was appointed to protect the rights of the absentees, who took on himself the trust; and after the form of a defence judgment was rendered by the court below in favor of the plaintiff, from which the real defendants have appealed.

An attorney for absent heirs, or a defensor appointed by the court to defend the rights of absentees in a suit against them ought not to be permitted to surrender any lawful means of defence on their part, to the injury of those he represents.

The record shows, in every step of the proceedings taken in the court below, want of skill or inexcusable negligence on the part of the defensor, by consenting to the introduction of improper testimony in favor of the appellee, and thus compromising the true interests of the defendants, in abandoning the just and legal defences of the cause.

And where from want of skill or inexcusable negligence on the part of a defensor, by consenting to the introduction of improper testimony in favor of the adverse party, &c., it will form a proper cause for the application of the law, authorizing this court to remand causes to be tried *de novo*, when in its opinion justice requires such a measure.

We are of opinion, that a person appointed by a court to defend the rights of absentees in a suit against them ought not to be permitted to surrender any lawful means of defence on their part, to the injury of those whom he represents. We think the present a proper case for the application of the law

**EASTERN DIS.** which authorizes this court to remand causes to be tried *de January, 1841.* *novo*, when according to our opinion justice requires such a

**GRAVIER'S  
CURATOR**

**vs.  
CARRABY'S  
EXECUTOR.**

measure.

It is therefore ordered, &c., that the judgment of the court of probates be avoided, reversed and annulled, and that the cause be remanded to said court to be there again tried. And it is further ordered that the appellee pay the costs of this appeal.

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**GRAVIER'S Curator vs. CARRABY'S Executor.**

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF  
NEW ORLEANS.

An obligation or contract without a cause, or with a false or unlawful one can have no effect, and the law will give no action to enforce it.

No action can be maintained on a contract the consideration of which is wicked in itself or prohibited by law.

A simulation is not necessarily a fraud. It is only when injury to third persons is intended that it becomes fraudulent.

So an agreement or contract that property which had been conveyed to persons to secure them for advances and protect the transferor from the pursuits of his creditors, should be sold out by the former *as theirs*, and the price accounted for to the latter, over and above *their advances*, in preference to judgment creditors, cannot be enforced in a court of justice.

This is an action by the Curator of the vacant estate of Jean Gravier, deceased, to recover from the Executor of Antoine Carraby, deceased, the sum of \$55,000, the value of certain property, which he alleges was conveyed to the Carraby's by simulated sales.

The plaintiff alleges that Jean Gravier died in October, 1834, at a very advanced age, in embarrassed circumstances,

but having claims to a large property. That he conducted his business loosely, from 1803 to the time of his death; being in constant dread of executions, he early commenced concealing his property from his creditors by passing simulated sales to various persons who advanced him money on usurious interest, who were to hold his property in trust for him, and at the same time to secure themselves for their advances. That the persons with whom he was in the habit of making these simulated contracts were Etienne, Pierre and Antoine Carraby, of New Orleans, and the late Nicolas Roche; the two last named Carraby's being associated as partners in commercial business.

EASTERN Dis.  
January, 1841.

GRAVIER'S  
CURATOR  
VS.  
CARRABY'S  
EXECUTOR.

The plaintiff further shows that a large square of ground bounded by Baronne, Phillipa, Gravier and Perdido streets, was, after several transfers, first from Jean Gravier in 1810 conveyed at his request to Pierre & Antoine Carraby, nominally for \$7000, but in fact they paid nothing but only held it in trust for said Gravier and to secure their advances to him. Several other squares and lots of ground all in the new Faubourg St. Mary, were in like manner conveyed; all of which transfers and sales by the said Gravier and others acting on his behalf, to the said P. & A. Carraby, are alledged to be simulated, without a valuable consideration, and executed with the intention of securing the Carrabys' for their occasional advances and for preventing said property from seizure; they always remaining the owner of the claims and the property. That in 1819, there was a settlement of accounts between the parties and an account current signed by them, in which Gravier became indebted for a balance of \$5730; and after this period he ceased to have any more dealings of consequence. In the following year he abandoned his affairs as hopeless and did not venture to let it be known that he was the owner of all of said property, which he had conveyed or transferred to the Carrabys; but on the contrary concealed it and denied his title to it, aware that it would be immediately seized by his creditors.

EASTERN Dis.  
January, 1841.

GRAVIER'S  
CURATOR  
vs.  
CARRABY'S  
EXECUTOR.

He further shows that in 1826 Pierre Carraby died, and his brother Antoine succeeded by inheritance to all his deceased brother's estate. That they have accounted for some of said property, but that they claimed the balance as their own, under the pretended pledge to them. That Antoine Carraby died in the kingdom of France, August 24th, 1832, and that P. Guesnon has been appointed his testamentary executor. That most of said property has been sold and that the estate of A. Carraby is liable for the value thereof. The plaintiff then enumerates the pieces of property for which said A. Carraby's estate is liable, and prays judgment for the sum of \$55,000, as the value thereof, and for \$5000 in damages.

After judgment by default the executor came in and applied for a delay of six months to answer in, which was disallowed by the court.

The defendant then pleaded a general denial; and if any sale or re-transfer of the property was ever agreed to be made by the Carraby's (which he expressly denies) he avers that Gravier failed to pay the price necessary to redeem said property.

These pleadings formed the material issues on which the case was tried.

The plaintiff propounded a string of interrogatories to the defendant with the view to procure all the information and acknowledgments concerning the books, papers and accounts of the Carraby's, as would have authorised their production; but were answered that the defendant knew nothing of them and supposed they were in France. In an amended petition the books and papers were more definitively described and the defendant obtained a delay of six months to answer the new call made on him. In the meantime Lafon and other creditors of Gravier intervened, averred the succession was insolvent; that they had an interest with the plaintiff in the success of the case. The suit was instituted in February, 1835. On the 29th January, 1836, the defendant answered

the plaintiff's supplemental petition, and the petition of intervention by a general denial. The trial commenced in April following and in May the defendant opened his case and introduced a mass of papers in evidence, (it being understood that it was subject to all legal objections) and the books and notes of Gravier were all deposited in court.

EASTERN DIS.  
January, 1841.

GRAVIER'S  
CURATOR  
VS.  
CARRABY'S  
EXECUTOR.

The papers of the Carrabys were received from France and let in new light on the facts of the case. They disclosed a regular series of accounts current, signed by both parties, beginning in 1812 and continuing until 1817; generally made out at the end of each year, showing the advances made by the Carrabys to Gravier and the moneys received by them for or from him. At the foot of each of these accounts is an agreement in which Gravier promises to pay the balance due by him in a year with twelve per cent. interest per annum, and the Carrabys' declare that as security for the payment of this balance they have "*en nantissement*" certain property which is very fully described, with the date of the acts given, by which Gravier apparently sold the property to them. The latest of these sales were made in 1815. Then follows an ordinary account current of the 17th October, 1819, without any mention of interest or property pledged. The last of these documents is dated December 27th, 1823, in which Gravier acknowledges himself indebted in the sum of \$13,277, which he promises to pay in one year. The Carrabys enumerate very minutely the property they have in pledge and Gravier agrees that if the debt is not paid at maturity the Carrabys shall have the right to sell so much of the property as may be necessary to pay themselves at public auction, after thirty days advertisement in two newspapers. These documents show that the amount of Gravier's debt was swelled by compound and usurious interest, from the sum of \$5730, the amount ascertained to be due in 1819, to the aggregate amount of \$13,277, in 1823!

It appeared at the commencement of this suit that Jean Gra-



**EASTERN DIS.** vier's succession was insolvent, but at the close of the investigation it was admitted it was solvent and that there would be a large balance for the heirs.

**January, 1841.**

**GRAVIER'S  
CURATOR**

**VS.**

**CARRABY'S  
EXECUTOR.**

be a large balance for the heirs.

The Judge of Probates came to the conclusion that there was the sum of \$22,920 due to Gravier's succession from the Carrabys, after settling the various accounts between them; and gave judgment for this sum; ordering it to be paid out of the funds of Antoine Carraby's succession, for the use and benefit of the succession of Gravier. The executor of Carraby appealed.

When the case came up to this court, the counsel for the defendant and appellant filed a peremptory exception, "that the action against the defendant as set forth in his petition cannot be maintained, because the contracts on which it is said to be founded are illegal, immoral and contrary to public policy," and "judgment should be entered against the plaintiff with costs."

*Eustis & Soulé*, on the part of the defendant and appellant, maintained that the principal cause of action as set forth in the plaintiff's petition is immoral and illegal; and wherever any legal cause of action is disclosed it is so coupled with the principal one, as to be inseparable from it. No court of justice can lend its aid to enable a party to recover in such a transaction.—See case of *Armstrong vs. Toler*, 11 Wheaton, 258, 275, and cases cited.

2. The case of *Griffin vs. Lopez*, decided by this court and reported in 5 Martin, 145; and relied on by the plaintiff's counsel, does not cover this case. The simulation in that case was not alledged to have been for purposes which the law repudiates.

*L. Janin*, for the plaintiff and appellee, insisted that when this suit was instituted, the estate of Gravier was insolvent. That the allegations were made in the petition and the action brought under these circumstances, which fully justified them. The curator represented the estate as insolvent and was acting

in behalf of the creditors; this claim was expressly based on its insolvency, and the right of the plaintiff as the representative of the creditors, to sue and set aside transactions entered into in fraud of their rights. Neither the plaintiff nor the intervening creditors then imagined they spoke in the name of Gravier or his heirs, or that the latter would have the least interest in the issue. The suit could not have been instituted on the ground of simple simulation; and the plaintiff could only recover in one of two cases; viz: if he could obtain from his adversaries a counter-letter, or if he proved *fraud upon third persons*. His allegations had therefore to be framed so as to meet both contingencies; and in the character he there acted, they could not injure the estate, whether one or the other of the supposed cases should be discovered to be the true one.

2. The facts of this case fully show that there was nothing illegal, immoral or contrary to public policy in Gravier's dealings with the Carrabys, except the usury of the latter. The real nature of Gravier's business with them is very easily understood. It is not shrouded in mystery as would assuredly have been the case if fraud had been intended; it is on the contrary, explained with great clearness in the explicit and business-like accounts current which the Carrabys rendered to Gravier from time to time. They acted as Gravier's agents on many occasions, and they stipulated twelve per cent. interest for advances, without any additional compensation for their trouble. They were less liberally rewarded than factors who attend to the business of planters. Instead of mortgages they took for their security simulated sales of property, intended to have the same effect. A regular account current, followed by the description of the property held, "*en nantissement*," was made out at least once a year. From 1817 down, they had no new dealings with Gravier, and only renewed notes he had given them for his debt, at short intervals, raising the interest to 18 per cent. In 1823, their last contract with him stipu-

EASTERN DIS.  
January, 1841.

GRAVIER'S  
CURATOR  
VS.  
CARRABY'S  
EXECUTOR.

EASTERN DIS.  
January, 1841.

GRAVIER'S  
CURATOR

VS.  
CARRABY'S  
EXECUTOR.

lated that if their claim was not paid within a year, they should be authorised to sell property enough to pay themselves.

The evidence does not show that Gravier had any intercourse with them after 1824. From 1825 to 1829, they sold all the property without rendering any account. The plaintiff now calls for this account, besides which he complains of certain usurious charges.

3. It is shown that previous to 1812 Gravier had similar dealings with E. Carraby and N. Roche; and his acts came under the eye of this court, when the object of his simulated sales was correctly interpreted. The court say that from the "evidence introduced it may be inferred that Roche was an agent of Gravier's, making to his *principal*, advances of money, for the security of which the latter made conveyances of land, which were to be rescinded on his paying any balance which he might appear to owe, from time to time, on a settlement of accounts.—See case of Ferrari's administratrix *vs.* Lambeth et al, 11 La. Reports, 106.

4. It also appears from the testimony, that when Gravier's intimacy with P. A. Carraby commenced, he ceased to have any business with Roche or E. Carraby. He never made a simulated sale to any person but to those who lent him money; his only simulated sales after 1812 were made to P. & A. Carraby and the last in 1815. During all this time Gravier was a rich man, though always pressed for money for want of management, and property to a very large amount was standing in his name. The property sold since the commencement of this suit, and which has rendered his estate solvent, was still in his name, and the large square of ground recently recovered from J. M'Donough, was not sold by the sheriff until 1830. This latter case is a striking illustration of the manner Gravier managed his affairs. In 1830, a great square of ground belonging to him was sold at sheriff's sale and bought by M'Donough for *only ninety dollars*. Since Gravier's death, in 1836, this same property was recovered by the present plaintiff from

McDonough and re-sold by him for *one hundred and twenty-eight thousand dollars!* This rendered the estate perfectly solvent *since the institution* of this suit.

EASTERN DIS.  
January, 1841.

GRAVIER'S  
CURATOR  
VS.  
CARRABY'S  
EXECUTOR.

5. As soon as the contracts and agreements between Gravier and the Carrabys were obtained and produced in evidence, it was clear the latter were Gravier's bankers and agents. It then becomes an *actio mandati directa*; a settlement of accounts between principal and agent. Neither party would be permitted to prove any thing contrary to or beyond them and no attempt of the kind was made. Not a syllable in all the numerous writings in evidence, shows that either party intended to injure third persons. The simulated sales between the parties were proved, and the Carraby's were called on to account for all the property of Gravier's which had thus been transferred and held or sold by them. There is no fraud in this, and especially as relates to third persons or creditors. The matters set forth in the exception filed in this court are not shown to exist, and the grounds assumed in the defence cannot avail the defendant. This action is clearly maintainable on principles settled by a decision of this court.—See the case of Griffin's executor *vs.* Lopez, 5 Martin, 145.

*Bullard, J.* delivered the opinion of the court.

The plaintiff, curator of the estate of Jean Gravier, represents in his petition, that his intestate always conducted his business in a very careless manner, neglected his numerous engagements, and from the year 1803 to the time of his death suffered many judgments to be rendered against him, and much of his property to be seized and sold under execution. That being constantly in dread of executions and pressed for money, he early commenced a practice of concealing his property from his creditors by passing simulated sales of it, and making conveyances of his property to various persons who advanced him money on usurious interest and who were to hold the property in trust for him and to secure their advances. It is alleged that the persons with whom these simu-

EASTERN DIS.  
January, 1841.

GRAVIER'S  
CURATOR  
VS.  
CARRABY'S  
EXECUTOR.

lated contracts were principally intered into, were the late Nicholas Roche, and Etienne, Pierre and Antoine Carraby. The petitions enumerates several pieces of property which it is alleged were conveyed to the Carrabys by such simulated contracts without consideration but intended to secure the said Carrabys' occasional advances of money, and to prevent the seizure of said property.—The said Gravier always remaining the real owner of said property. It is further alleged that the affairs of Gravier in that manner became utterly deranged, and that in 1824, judgments were rendered against him for large amounts, and that the property remaining in his name was seized and sold, but that the Carrabys protected the property thus nominally conveyed to them from seizure. That after that period Jean Gravier abandoned his affairs as hopeless and did not venture to let it be known that he was the owner of said property, but on the contrary concealed his other property and denied his title to it, lest it should be immediately seized by his judgment creditors. The plaintiff proceeds to allege that the property thus conveyed was sold by the Carrabys and the object of the present suit is to compel their legal representatives to account to the estate of Gravier for the value of the property thus alienated by them to the prejudice of Gravier.

The judgment of the court of probates having sanctioned to a certain extent these pretensions of the plaintiff, the defendant prosecutes the present appeal. His counsel has interposed in this court a peremptory exception founded upon the alleged illegal and immoral character of the agreements between the original parties and invokes the maxims of law, "*allegans turpitudinem suam non est audiendus*;" and "*ex turpi causâ non oritur actio*."

The counsel for the appellee contends in reference to this exception, that it ought not to prevail because the plaintiff being curator of the estate of Gravier represents the creditors rather than the heirs, and that although since the institution

of this suit it has turned out that the estate is solvent, and that the amount reserved may benefit the heirs, yet the principle relied on is inapplicable to the present case.

EASTERN DIS.  
January, 1841.

GRAVIER'S  
CURATOR  
VS.  
CARRADY'S  
EXECUTOR.

The first part of this argument assumes as a principle that contracts admitted to be reprobated by law contrary to good morals and public order may be enforced for the benefit of creditors although not for the direct personal advantage of one of the parties.—But the Code declares that an obligation without a cause or with a false or an unlawful one can have no effect. The law gives no action to enforce them whoever may demand it, unless it be in cases of innocent holders of the evidence of such contracts in a commercial form. It is enough in the present case, in our opinion, that the legal representative of Gravier is plaintiff to let in the enquiry as to the turpitude of the transactions out of which this suit has grown.

An obligation or contract without a cause, or with a false or unlawful one can have no effect, and the law will give no action to enforce it.

By the Roman law the right to recover back what had been paid on an illicit contract depended upon the question which of the parties was dishonest or whether both were chargeable with the same turpitude. If the party who had received were alone dishonest the sum paid could be recovered back even although the purpose for which it was given had been accomplished. "*Quod si turpis causa acceipientis fuerit, etiam si ressecuta sit, repeti potest.*"—As in the case supposed by Julian of money paid to prevent the commission of sacrilege, robbery or murder. But where both parties are chargeable with the same turpitude the law gives no action.—"*Ubi autem et dantis et acceipientis turpitudine versatur non posse repeti dicimus.*"—And the case supposed by Paul is that of a bribe given to the adversary's attorney, which could not be recovered back.—"*Nam turpiter accepta pecunia justius penes eum est qui deceptus sit, quam qui decepit.*"—In such cases the maxim is "*impari causâ turpitudinis potior est causâ possidentis.*" Pothier's Pandectes 5 vol. 12 Book title 5. These principles apply in cases where the corrupt or repro-



**EASTERN DIS.** bated contract has had its effect and the object of the action  
**January, 1841.** is to repair the injury complained of by one of the parties.

**GRAVIER'S  
CURATOR**

**VS.  
CARRADY'S  
EXECUTOR.**

It is hardly necessary to add that *à fortiori* the law will not lend its aid to enforce the performance of such contracts in the first instance. The principle has been held to apply not only in relation to the original corrupt or reprobated contract but to any new engagements growing immediately out of it.—The chief Justice in delivering the opinion of the court of the United States in the case of *Armstrong vs. Toler*, says, “no principle is better settled, than that no action can be main-

No action can be maintained on a contract the consideration of which is wicked in itself or prohibited by law.

tained on a contract the consideration of which is either wicked in itself or prohibited by law. How far this principle is to affect subsequent or collateral contracts the direct and immediate consideration of such is not immoral or illegal, is a question of considerable intricacy, on which many controversies have arisen and many decisions have been made.” After reviewing several of those cases the chief justice says, “one of the strongest cases in the Books is *Steers vs. Laushley*, (6 Term, Rep. 61) where the broker had been concerned in stock jobbing transactions and had paid the losses, drew a bill of exchange for the amount on the defendant and after its acceptance endorsed it to a person who knew of the illegal transaction on which it was drawn, the court held that such endorsee could not recover on the bill.” 11 Wheaton, 258—274.

This court has in more than one case recognized these principles and especially in the case of *Mulhollan vs. Voorhies*. 3 Martin N. S. 48.

But the counsel for the appellant relies upon the case of *Griffin vs. Lopez*, 5 La. Rep. 145, as sanctioning a different doctrine, and upon 2 Chardon *Traité du dol et de la fraude*. In that case the original intent of the parties does not appear to have been dishonest or immoral. One of the parties it was alleged entered into a simulated contract with the other in order to protect a part of his property from unjust law-

*suits and prosecutions by certain enemies.* It appears that there was also a counter letter executed. The object of the suit was to prevent the apparent vendee from disposing of the property as his own, after having obtained surreptitiously possession of the counter-letter which alone showed the true contract or rather the absence of any contract between the parties. A simulation is not necessarily a fraud. It is only when injury to third persons is intended that it becomes fraudulent; and the decision in the case of *Griffin vs. Lopez* does not appear to militate against the principles above expressed, for if the simulation was at first innocent and not intended to injure third persons. The subsequent suppression of the counter-letter and conversion of the property to the sole use of the apparent vendee was in itself a fraud against which the apparent vendor was probably entitled to the protection of the law. We are not prepared to say that the principle recognized in that case is applicable to the present.

EASTERN DIS.  
January, 1841.

GRAVIER'S  
CURATOR  
VS.  
CARRABY'S  
EXECUTOR.

A simulation is not necessarily a fraud. It is only when injury to third persons is intended that it becomes fraudulent.

But we are referred to a French author who has treated *ex professo* the subject of fraud and simulation and the plaintiff's counsel places great reliance upon him in support of his cause. The theory of this author is that even in relation to the parties themselves simulation is a ground of radical nullity, and that each one may attack it against the other who seeks to consummate the intended fraud or by a new fraud profit by the first. He lays down an axiom well worthy of attentive consideration as the source in our opinion of the errors of his system—to wit: "that whatever may be the object or purpose of a fraudulent simulation it has that reprobated character *only because it infringes a prohibitory disposition* of the law.—Now in this case it can have no effect." He then quotes the two articles of the Code Napoleon, 1131 and 1133, corresponding to those of the Code of Louisiana, which declare that an obligation without cause or consideration or with a false or unlawful one can have no effect; and that the cause is unlawful when it is prohibited by law, when

**EASTERN DIS.**  
January, 1841.

**GRAVIER'S  
CURATOR  
VS.  
CARRABY'S  
EXECUTOR.**

it is contrary to good morals and public order, he proceeds to say, "we have nowhere either in the Code or elsewhere any statute more absolute or less susceptible of exception; it is one of the fundamental principles of the theory of contracts, and it is *established for the sole interest of the contracting parties*, since in relation to third persons their condition is secured by art. 1165; "contracts have their effects only between the contracting parties and do not affect third persons."

Again the author says, "the contrary system is founded upon the axiom "*propriam turpitudinem allegans non est audiendus*"—it will be instantly perceived that this axiom can be properly invoked only by third persons, when the author of the fraud seeks to use it as an arm against them. Another axiom not less moral may be opposed to it, "*nemini sua fraus patrocinarī debet*." But it is not by axioms so general and which are not re-enacted by any text of our Code, that exceptions can be created to a rule so imperative as that set forth in the articles which we have first cited.

This position, that the maxim which denies an action in reference to immoral or prohibited contracts has relation only to third persons, cannot receive the sanction of this court. The whole of the 5th title of the 2d. Book of the Digest treats the matter as it relates to the parties towards each other, either as to the right to enforce dishonest and immoral contracts or to recover back what has been already paid in execution of them.—Nor can we concur with that author in the opinion, that this stern morality of the Roman law has not been retained in our modern legislation.—On the contrary we think that when the Code declares that contracts prohibited by law, or contrary to good morals or public order shall have no effect, it recognizes the same general principle, and although the fundamental precepts of the ancients "*honesté vivere, alterum non lædere, suum cuique tribuere*," constituting the religion of the law, have not been expressly vene-

rated as formal texts, yet they lie at the foundation of our jurisprudence, and that courts of justice are not reduced to the humiliation of adjusting among dishonest men the results of their unholy speculations or of protecting one party against another while engaged in a common purpose, at war with the best interests of society and subversive of public order.

EASTERN DIS.  
January, 1844.

GRAVIER'S  
CURATOR  
VS.  
CARRABY'S  
EXECUTOR.

It remains to enquire whether these principles are applicable to the case now before the court, and what was the true character of the dealing and contracts between the original parties. It is not denied that the pretended sale of lots and other property by Gravier to the Carrabys was for the double purpose of protecting the property against the pursuits of his creditors and of securing the reimbursement of certain loans of money and other advances with usurious interest; and that to a certain extent it was successful. That such contract was fraudulent and might have been successfully attacked as such by the creditors at the time, if they had had the proofs now before us, we cannot doubt. The Carrabys were made to appear to the world as absolute owners and thus the judgment creditors of Gravier were frustrated in their pursuits. The ultimate agreement was that the property should be sold by the Carrabys as theirs, and the price accounted for to Gravier's over and above the amount of their advances, in preference to the judgment creditors. Would a court of justice have lent its aid to enforce such a contract? to carry out the fraudulent intentions of the parties?—Could Gravier at that time have recovered damages from the Carrabys for the non-performance of such a contract? We think he could not. "In pari causa turpitudinis potior est conditio possidentis." This action is brought by his legal representative to recover from the estates of the Carrabys the value of the property thus alienated together with damages.

So an agreement or contract that property which had been conveyed to persons to secure them for advances and protect the transferor from the pursuits of his creditors, should be sold out by the former as theirs, and the price accounted for to the latter, over and above their advances, in preference to judgment creditors, cannot be enforced in a court of justice.

We conclude that the exception ought to be sustained.

It is therefore ordered, adjudged and decreed, that the

EASTERN Dis. judgment of the court of probates be avoided and reversed  
February, 1841. and that ours be for the defendant with costs in both courts.

GRAVIER'S  
CURATOR  
VS.  
CARRABY'S  
EXECUTOR.

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**GRAVIER'S Curator vs. CARRABY'S Executor.**

ON AN APPLICATION FOR A RE-HEARING.

Where an exception is put in, at the argument in the Supreme Court, suggesting that the contracts between the parties to the suit are illegal, immoral and contrary to public policy, the court is bound to notice it, even without any plea, and in such cases no recovery can be had.

So where it is shown by the evidence that the contracts and agreements sued on are of a character reprobated by law, no action can arise or recovery be had.

This case comes up on an application for a re-hearing.

*L. Janin*, for the plaintiff, recapitulated the facts of the case and urged a re-hearing on the ground that the decision was erroneous, in considering the exception filed in this court as going to extinguish the cause of action. He then proceeded to show that the exception on file is not a peremptory exception founded on law, but simply a demurrer to the sufficiency of the allegations of the petition, and which could not be pleaded in the Supreme Court.

2. That, even if the exception had been what it was supposed to be, if it had alleged that the contracts sued on were illegal, and gave no cause of action, it could not have been pleaded in the Supreme Court.

3. That if the supposed exception had been pleaded in the inferior court, and at the proper time, it would not avail the defendant, because the evidence conclusively shows that it is not founded in fact.

4. That the erroneous allegations in the petition having been made by the curator of an insolvent estate, on behalf of the

creditors, cannot prejudice the heirs, as they were not the parties in interest until the estate was solvent, and the estate became solvent only during the progress of the trial of the suit.

EASTERN DIS.  
February, 1841.

ORAVIER'S  
CURATOR  
VS.  
CARRANT'S  
EXECUTOR.

5. That even the judicial confession of the curator of an estate could not defeat the rights of the heirs, he having no authority to make judicial confessions.

6. That the party himself can retract his judicial confession, if he discovers and proves that it was the result of an error of fact.

The defendant does not say that the contracts which were in evidence are contrary to law. He says that the action, as set forth in the petition cannot be maintained, because the contracts, on which it is there said to be founded, are illegal.

He objects, not to the case as made out, but to the case as stated in the petition.

This is the exception so familiar in our practice, that the plaintiff shows no right of action on the face of the petition. In the common law it is called a *demurrer*, in the civil law a *peremptory exception relating to form*.

Article 344 of the Code of Practice, says: "Peremptory exceptions, relating to forms, are those which tend to have the cause dismissed, owing to some nullities in the proceedings."

"Such exceptions must be pleaded *in limine litis*, that is to say, at the beginning of the suit, and before answering to the merits."

"After the defendant has pleaded to the merits, such exceptions shall not be heard, all nullities are cured."

This exception is always disposed of, before an inquiry into the merits; the only question presented by it, is the sufficiency of the allegations of the plaintiff to support the action; for the purpose of this inquiry, the allegations are assumed to be true, no evidence is ever admitted, and if the exception is sustained, the suit is *dismissed*, and the plaintiff is non-suited, but he may commence his action again, though in a different form.

In the recent case of *Martin vs. M'Masters*, 14 Louisiana



EASTERN DIS. *Reports*, 422, this court said: "The answer avers that the plaintiff, from his own showing has no cause of action."

February, 1841.

GRAVIER'S  
CURATOR  
VS.  
CARABY'S  
EXECUTOR.

"The defendant's exception was one of those which are called peremptory to the *suit*, but not to the *action*. If it prevail, it did not impair the action, *id est*, the right of bringing another suit. *Code of Practice*, article 1. But it destroyed or abated the suit, *id est*, the means to which the plaintiff had resorted to avail himself of his action, leaving him at liberty to pursue his remedy in another suit. The defendant, therefore, had an incontestable right to have his exception considered, independently of any other matter of defence. The *Code of Practice*, article 336, expressly requires the defendant to plead, in his answer, all the dilatory or peremptory exceptions on which he intends to rely, except as relates to declinatory exceptions."

A peremptory exception, *founded on law*, on the other hand, is a real defence on the merits; it assumes that the right of action had once existed, but had ceased to exist, because it is either prescribed, or has been destroyed, or extinguished. A peremptory exception, founded on law, always requires to be supported by evidence, and if well founded, results in a final judgment against the plaintiff, and destroys his right of action. *Code of Practice*, 345, 346.

It is thus not difficult to determine that the exception in question is a peremptory exception, relating to form, not one founded on law, and was not admissible in the Supreme Court.

If the defendant can no longer avail himself of such an exception, after having neglected to plead it before or with his answer, it follows that the insufficient or erroneous allegations of the petition can be cured by the evidence. For this reason, this court has frequently decided, that although a party should mistake the nature of his right in his averments, still if he is entitled to relief, he will recover according to the evidence.—*Canfield vs. McLaughlin*, 9 *Martin*, 317; *Bryan and Wife vs. Moore*, 11 *Martin*, 27; 5 *Martin*, 596, &c. &c.

The form of this exception is not accidental: the counsel who filed it, and who had tried the case in the court below, could have no more doubt than the plaintiff had himself, that the allegations in the petition, concerning the supposed illegality of the contracts, were contradicted and corrected by the evidence.

EASTERN DIS.  
February, 1841.

GRAVIER'S  
CURATOR  
VS.  
CARRABY'S  
EXECUTOR.

It is, therefore, very clear, that the question whether the real and written contracts between Gravier and the Carrabys had an illicit object, was not even before the court.

II. Even if the exception had alleged, that the contracts in evidence and now sought to be enforced, were illegal, it could not have been pleaded in the Supreme Court.

"Peremptory exceptions founded on law, are those which, without going into the merits of the cause, show that the plaintiff cannot maintain his action, either because it is prescribed, or because the cause of action has been destroyed or extinguished." *Code of Practice, article 345.*

The clear language of this article supposes that a cause of action once existed, and that it was subsequently destroyed. It does not apply to a case where no cause of action ever existed. The present is said to be such a case, and the law cannot be extended beyond its legitimate meaning. 1 Carré Proc. Civ., p. 242 (Edition de Bruxelles).

"Peremptory exceptions, founded on law, may be pleaded in every stage of the action, previous to the definitive judgment, but they must be pleaded specially, and sufficient time allowed to the adverse party to bring his evidence." *Code Practice, art. 346. See also art. 902.*

2. The high and somewhat dangerous privilege granted to peremptory exceptions, must be confined within proper bounds, and it will be conceded, that parties must be cautiously protected against surprise. Both the articles cited, speak of exceptions supported by the evidence in the record; the advantage which the defendant in this case might have taken of the erroneous allegations in the petition, was lost by his neglect to

EASTERN DIS.  
February, 1841.

GRAVIER'S  
CURATOR  
VS.  
CARRANT'S  
EXECUTOR.

except to them in the lower court, and by his allowing the introduction of evidence, and still more, by his introducing evidence himself, in contradiction of them. When evidence is offered on which a peremptory exception may be founded, the adversary is sufficiently warned; proof of payment, compensation, *res judicata*, &c., at once intimates the use for which it is intended; it may be resisted, if no special plea has been made, and by this resistance the party relying on it will be compelled to make a distinct averment. But how different are the circumstances of this case! Contracts now considered illegal are alleged in the petition, this is met by a general denial, proof is furnished by the defendants, showing that the transactions were of unquestionable legality: the plaintiff recognizing his error, admits that the denial of the defendant is well founded, so far as it controverts the original illegality of the agreements: the whole evidence proves that with the exception of usury, there was nothing reprehensible in them, and now he is to be, not non-suited, but finally condemned, because his ignorance of the information in the possession of the defendant, caused him to make an erroneous allegation. If this plea had been made in the inferior court, the plaintiff could at once have shown that his information was necessarily deficient at the time of the institution of this suit, and that the knowledge he subsequently acquired of Gravier's business, in the course of his administration, the contracts produced by the defendant and many other circumstances, of which the evidence was at hand, enabled him to explain and retract his error. No case has, perhaps, ever been presented to this court, in which it was attempted to take a suitor by surprise in so glaring a manner. See case of *Harvey vs. Fitzgerald*, 6 Martin, 549.

The plaintiff therefore concludes, that the exception here spoken of, could not have been pleaded in the Supreme Court: 1st. Because its purport is not, in the words of article 345 of the Code of Practice, that a cause of action,

once existing, has been destroyed by a subsequent event, and that, therefore, it is not a peremptory exception founded on law within the meaning of the code, but a defence on the merits, which ought to have been pleaded in the answer. 2d. Because no evidence has been received in support of it.

EASTERN DIS.  
February, 1841.

GRAVIER'S  
CURATOR  
VS.  
CARRABY'S  
EXECUTOR.

III. The facts of the case fully show, that there was nothing illegal, immoral, or contrary to public policy in Gravier's dealings with the Carrabys, except the usury of the latter.

And here the plaintiff is called upon to notice, with all due respect, the errors, concerning the facts of this suit, into which the court has fallen.

The court says: "It is not denied, that the pretended sale of lots and other property, by Gravier to the Carrabys, was *for the double purpose of protecting the property against the pursuits of his creditors*, and of securing the reimbursement of certain loans of money, and other advances, with usurious interest."

The plaintiff's counsel begs leave to disclaim the fatal admission here attributed to him. The pretension that Gravier acted under the illegal motive stated by the court, was not set up in the court below; it is not mentioned in the judgment of the Court of Probates, which contains a full review of the facts; it was denied by the plaintiff's counsel, at the first trial of this case, and again the brief filed by him on the second trial. In that brief, the cause of the error in the allegations of the petition is stated and explained, though less stress was laid on it than at present, because the exception was considered harmless under the circumstances of the case. It would be difficult for the counsel to have made such an admission, with his present knowledge of Gravier's business, and his familiarity with the record of this suit.

Further on the court says: "The ultimate agreement (here the court alludes to the agreement of December 27, 1823) was, that the property should be sold by the Carrabys as theirs, and the price accounted for to Gravier, over and above the amount

EASTERN DIS. *of the advances in preference to judgment creditors.* Would February, 1841. a court of justice have lent its aid to enforce such a contract?

GRAVIER'S  
CURATOR  
VS.  
CARRABY'S  
EXECUTOR.

To carry out the fraudulent intention of the parties? Could Gravier at that time have recovered damages from the Carrabys for the non-performance of such a contract? We think not."

The passage in italics is so important, that the whole decision of the court turns on it, and not one word of it, or any thing in the least resembling it, is to be found either in the agreement of December 27, 1823, or in any other part of the record. No portion of the written or oral testimony contains the least explanation of what was to be done with the balance of the property or its proceeds, after the Carrabys should have paid themselves.

IV. The evidence, then, shows no illegal agreements, but contracts held to be illegal are alleged in the petition, and it has been said that this amounts to a judicial confession.

But those allegations were made in error, and under circumstances which deprive them of the effect desired by the defendant.

The plaintiff begs leave to refer to the statement of the case at the commencement of this brief. Here he will only repeat that the suit was instituted on the 6th of February, 1835, and then the estate was insolvent. By the repeated efforts of the defendant, the trial was delayed until the 27th of April, 1836. On the 29th of April, J. P. Lafon was offered as a witness, and objected to by the defendant, because she was a creditor of the estate, and therefore interested in making it solvent, (p. 88). But the court admitted her, because it was proved that she had a first judicial mortgage for her claim of \$7000, and that, *as to her*, the estate was solvent, because the curator had sold certain property a short time previous, for \$38,500. This shows, that after the commencement of the trial the estate was still believed to be insolvent by both parties. In May, 1836, this court decided the case of M'Do-

nough *vs.* Gravier's curator, (9 Louisiana Reports, 541) and EASTERN DIS. the property recovered in it was sold on the 15th July, 1836, February, 1841. and rendered the estate entirely solvent. In the mean time the trial of this case had been progressing, but owing to frequent and long interruptions, it was not concluded until the 28th of December, 1836.

GRAVIER'S  
CURATOR  
VS.  
CARRANT'S  
EXECUTOR.

These circumstances explain perfectly the nature and purport of the plaintiff's allegations. They were made by the curator of an insolvent estate, who is eminently the representative of the creditors. His rights and duties are entirely analogous to those of a syndic. *Elliott vs. White*, 5 Louisiana Reports, 324; *Hall vs. Mulhollan*, 7 Louisiana Reports, 389; *Poultney vs. Cecil*, 8 Louisiana Reports, 419. Certain successions are administered by syndics. 2 Moreau's Digest, 438. According to article 1166, of the La. Code, "when the succession is administered by a curator, the creditors are not permitted to appoint syndics under the pretext that the succession is insolvent, the curator supplying the place of syndic in this respect."

This was essentially a revocatory action, which, in case of insolvency, can only be instituted by the syndic, (Civil Code, article 1988; 3 Louisiana Reports, 461; 6 *ibid*, 83; 12 *ibid*, 19), and after the death of the debtor, by the curator of his estate. *Vienne vs. Boissier*, 10 Martin's Reports, 359; *Hall vs. Mulhollan*, 7 Louisiana Reports, 389. No single creditor would be permitted to institute it. But in this case five of Gravier's creditors intervened, and joined the curator in the revocatory action: The claim was expressly based on the insolvency of the estate and on the right of the plaintiff, as the representative of the creditors, to set aside transactions entered into in fraud of their rights. Neither the plaintiff nor the intervening creditors then fancied that they spoke in the name of Gravier or his heirs, or that the latter would have the least interest in the issue. They, therefore, were under no necessity of being as guarded in the



EASTERN DIS. allegations by which they charged the defendant, as if they  
February, 1841. had considered that their rights were only those which Gra-

GRAVIER'S  
 CURATOR  
 VS.  
 CARRARY'S  
 EXECUTOR.

vier himself might have maintained. The suit could not have been instituted on the ground of simple simulation, and the plaintiff could recover only in one of two cases, viz: if he could obtain from his adversaries a counter letter, or if he proved fraud upon third persons. His allegations had therefore to be framed so as to meet both contingencies, and in the character in which he then acted, they could not injure the estate, whether the one or the other of the supposed cases should be discovered to be the true one. It was, above all, necessary that they should be sufficiently comprehensive.

V. Even the judicial confession of a curator could not destroy the substantial rights of the estate he represents. It will be proof when not shown to be contrary to the truth, but when the evidence exhibits a different state of facts, it must be disregarded. This distinction is believed to be both practical and required by justice; and it may even be affirmed, though it is not necessary to decide it in the present case, that a judgment rendered in consequence of the judicial confession of a curator, administrator, tutor, syndic, &c., would not be binding upon the real party in interest, if he could clearly show error or fraud in the admission. For such legal agents have no authority to make judicial confessions.

Article 2270, of the Civil Code, says, that the judicial confession is the declaration which the party or *his special attorney in fact* makes in a judicial proceeding. This article is a copy of article 1356 of the French Code. Such legal administrators are not the special agents of the parties whom they represent: they have none of the powers for which a special mandate is required according to article 2966 of the Civil Code. He only can make a judicial confession, who has power to alienate the object intended to be affected by it. In France, an attorney can make no admission of facts

in the pleadings, unless he has a written power to that effect, EASTERN DIS. February, 1841. (10 Toullier, 400) and in its absence, the admission may be retracted by the party without showing that it was erroneous. It is well known, that even an executor cannot waive the plea of prescription. Lafon's Heirs *vs.* His Executors, 3 N. S., 716; 6 Cond. Reports, 649. And in the case of Ashcraft *vs.* Flint, 4 Louisiana Reports, 498, it was decided, that the curator of an estate cannot confess judgment and consent that particular property shall be seized under an execution issued in consequence of that judgment. "The plaintiff was a minor at the time this sale took place, and his property could not be alienated in the manner it was attempted here. The curator had no authority to discharge a debt due by the succession, in any other manner than by a sale under the authority of the Court of Probates. *Had he confined himself to the mere acknowledgment of a debt, and suffered execution to run in the ordinary way, a question might be raised whether the act was void or voidable.*"

GRAVES'S  
CURATOR  
VS.  
CARRANT'S  
EXECUTOR.

It will be observed that the curator spoken of, was the curator of an estate, and that the property of a vacant estate cannot be disposed of in any other manner than the property of minors.

VI. The judicial confession when made by the party himself, may be retracted, if it is proved that it was made through error of fact. Civil Code, 2270; French Code, article 1356. And in this case the error of fact is proved by the whole evidence, and more particularly by that introduced by the defendant. The cause of the error has already been sufficiently explained.

The plaintiff will only add, as an apt illustration of the policy of the law, that in Rome and in Spain, a party was relieved against an erroneous admission, even if he did not discover it until after the appeal. Part 3, tit. 13, l. 5, and Gregorio Lopez, note 5.

For these reasons the plaintiff prays, that the decision of

**EASTERN DIS.** this court may be reviewed and that judgment may be rendered, amending the judgment of the Probate Court, according to the plaintiff's prayer on file.

**GRAVIER'S  
CURATOR**

**VS.**

**CARRABY'S  
EXECUTOR.**

*Bullard, J.* delivered the opinion of the court.

In this case the plaintiff's counsel has asked for a rehearing and has urged several arguments in support of it. We have kept the case under advisement a long time and maturely considered the arguments adduced, and now proceed to state the reasons why we think the application should be overruled.

The counsel for the plaintiff does not controvert the general principles laid down by the court, as applicable to cases such as this was supposed to be, but he does not admit that the exception set up by the counsel for the defendant, is such a peremptory exception as may be pleaded in this court. We think this difficulty may be easily disposed of. The exception certainly suggests to the court that the contracts between Gravier and the Carrabys were "illegal, immoral and contrary to public policy." If that be true, this court is bound to notice it without any plea, as was done in the case of *Mulhollan vs. Voorhies*, 3 *Martin, N. S.*, 46; and consequently it is useless to inquire whether the exception be such as the party has a right to plead in this court, according to the Code of Practice.

Where an exception is put in at the argument in the Supreme Court, suggesting that the contracts between the parties to the suit are illegal, immoral and contrary to public policy, the court is bound to notice it, even without any plea; and in such cases no recovery can be had.

Two supposed errors in matters of fact are pointed out in the opinion of the court. The first in that part in which it is said, that "it is not denied that the pretended sale, &c., was for the double purpose of protecting the property against the pursuits of his creditors, and of securing the reimbursement of certain loans of money and other advances with usurious interest." The counsel treats this as if we took it as an admission on his part; such was not the meaning of the court, unless the allegations in the petition may be regarded as his admissions. On the contrary he demonstrated to us clearly that the contracts were not really sales, but intended to secure loans on usurious

interest, and it is also shown that attempts were made on the part of judgment creditors to make that property liable, but failed except as it relates to some land in Attakapas. The deputy sheriff at that time, Holland, testified that there were numerous executions against Gravier in his hands; that a part of the property was actually seized, but released by order of Mr. Moreau, the plaintiff's attorney, on the exhibition of the act of sale to the Carraby's. The contract therefore admitted to be simulated was used to baffle the pursuits of creditors. The Carraby's still insisted on their right as apparent on the public act, instead of permitting the residuary interest of Gravier, according to the counter letters, to be sold. The parties appear to have understood each other.

The counsel further complains that the final agreement of the parties was not correctly stated by the court. We said that it appeared the property was to be sold by the Carraby's as theirs, "and the price accounted for to Gravier over and above their advances in *preference to judgment creditors*." It is true that the judgment or rather the letter of Gravier does not expressly state this preference; but the very object of this suit is to compel the representatives of the Carraby's to account for the balance after paying what was really due to them, long after the judgment creditors had been successfully resisted under color of these simulated contracts. The inference that the parties intended that Gravier should receive the surplus in preference to other creditors, does not appear to us illogical.

Admitting therefore that all the allegations in the petition are not supported by the evidence; and that the case is to be decided according to the *probata* and not the *allegata*, yet enough is shown by the evidence to satisfy us that the contracts and agreements were of a character reprobated by law, and out of which no action can arise.

The rehearing is therefore refused.

EASTERN DIS.  
February, 1841.

GRAVIER'S  
CURATOR  
VS.  
CARRABY'S  
EXECUTOR.

So where it is shown by the evidence that the contracts and agreements sued on are of a character reprobated by law, no action can arise or recovery be had.

EASTERN Dis.  
February, 1841.

**BARRIERE f. w. c. vs. GLADDING'S Curator.**

BARRIERE F.W.C.

vs.  
GLADDING'S  
CURATOR

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY

OF NEW-ORLEANS.

A note executed in *extremis*, in favor of the concubine for a sum of money shown to have been in lieu of the value of a house and lot, which the deceased intended to bequeath, but was unable to make his will; is considered as a disposition *mortis causâ*, and not being clothed with the formalities of law, is without effect.

No disposition *mortis causâ* can be made, but by last will and testament; and when it is clearly proved, that the deceased intended to make his will, for the avowed purpose of *bequeathing* to his concubine certain immoveable property, but was prevented and gave his note for its value;—*Held* that no recovery can be had on it.

This is an action on a promissory note, executed by J. H. Gladding, a few hours before his death, in favor of the plaintiff, a free woman of colour, with whom he lived and called his house-keeper, for the sum of \$4,000, payable 30 days after date. Suit was brought against the curator of the deceased, who refused to allow or pay it.

The curator pleaded that said note was not Gladding's voluntary act; but was made in his extreme and last sickness, when he was incapable of making any act, not even his last will. That no consideration was given for said note; the deceased living in concubinage with the plaintiff was incapable of receiving by donation remunerative or otherwise more than one-tenth part of his estate, which she had already received in money and moveables: He prays that the plaintiff's demand be rejected, &c.

Upon these pleadings and issues the cause was tried.

On the trial the facts set up in the pleadings were substantially proved. The testimony of a notary showed that the deceased sent for him and he went to see him about ten o'clock on the day he died, and was requested to make his Will. The deceased told him he wished to give all his property to a free coloured illegitimate child, he had living with one of his sisters in Albany, and to a free coloured woman

(the plaintiff) with whom he had been living, calling her his house-keeper. On being told he could not make a valid will and disinherit his brothers and sisters, he then desired to pass a sale of the house and lot he lived in to the woman, but the notary refused, and soon after left him. About four o'clock he made the note now in suit, which he signed by making his mark, and in about three hours afterwards he died. It was shown that the amount of the note was intended to be in place of the house and lot, proposed to be bequeathed to the plaintiff. The testator however declared that it was given as a reward or remuneration of the plaintiff, who he said had been very faithful to him. It appeared she had a servant or two and some personal property, and money which she had received from the deceased.

EASTERN DIST.  
February, 1841.  
BARRIERE F.W.C.  
vs.  
GLADDING'S  
CURATOR

The Judge of Probates, by reason of the 1468th article of the Louisiana Code, gave judgment in favor of the Curator, disallowing the demand, and the plaintiff appealed.

*Kennicott* for the plaintiff, argued from the following points:

1st. The note sued upon in this case was executed by the late J. H. Gladding, during his last sickness, and was his own voluntary act, done when he was possessed of a sound memory, and the other mental qualifications required to enable a man to bind himself and heirs, in a valid contract.

2d. The consideration for this note was the services at *hard labour* of the plaintiff, for twelve years; and is therefore sufficient, lawful, and competent; and constitute more than an equivalent for the value of the aforesaid note.

3d. The Judge, *a quo* erred in supposing that the note was not given as a remuneration for the long and faithful services of the plaintiff. The late J. H. Gladding repeatedly during the twelve years, acknowledged the great value of said services, and that by the profit arising therefrom, he had been enabled to accumulate his little fortune.

4th. Under these circumstances, Gladding, *with the pros-*



EASTERN DIS. pect of death before him, might naturally be supposed to  
February, 1841. desire to do justice to the living before entering upon *eternity*,

HARRIÈRE F.W.C. particularly to one who had been to him in sickness and health

vs.

GLADDING'S  
CURATOR

a slave for years.

5th. The Judge, *a quo* erred. There was no simulated sale of house-hold furniture, and the check for \$700 was not given as a compensation for plaintiff's services, but for money loaned to Gladding, and of which he had the use for many years; and when too he was in a state of penury and want.

The judgment of the Court of Probates must be reversed, that justice may be done.

*Preston*, for the defendant, relied upon the illegality of the consideration of the note, that it was a disguised donation in the form of a disposition *mortis causâ* and illegal, null and void.

*Simon J.* delivered the opinion of the court.

Plaintiff sues to recover a sum of \$4,000, which she alleges to be the amount of a note subscribed by Joseph H. Gladding, on the 25th of July, 1839. The defendant, who is the curator of the succession of the alleged maker of the note, pleads, that the instrument sued upon was not the voluntary act of the deceased, but was made when from his extreme and last sickness he was incapable of making any act not even a last will; that no consideration was given for the said note, and that the plaintiff lived in a state of concubinage with the deceased, and was incapable of recovering by donation, remunerative or otherwise, more than one-tenth part of his estate, which she had already and actually received in money and moveables.

The evidence shows, among other facts which it would be too long to detail, that the plaintiff and the deceased lived in a state of notorious concubinage; that the note sued on was signed after four o'clock, P. M.; that Gladding died at about nine o'clock of the same evening; and that he was not in a

situation to make a contract, having been in the morning and afternoon apparently out of his senses; that the note was made to an amount equal to the value of a lot of ground and the buildings thereon erected, which the deceased *intended to bequeath* to the plaintiff; and that after the note had been read to Gladding, he said it was right, rose and although he used to write a good hand, made his cross to it, because he was very weak in body at the time to write. The evidence shows further that in the morning of the day of Gladding's death, a notary, Mr. Christy, had been sent for to make said Gladding's will; that the notary came, had a conversation with Gladding, and told him it was better to postpone the making of his will, as he would get better; that in the afternoon, the witnesses to the note proposed that a note should be given; and this was concluded upon because they could not have a will made. A great deal of testimony has also been adduced by the plaintiff to prove the value of her services as Gladding's servant; and she has attempted to show that the deceased's main object in signing the note of \$4,000 was to remunerate her for her said services. The record shows also the estate of the deceased to be worth \$22,600, \$1,633 of which consist in moveables, and the balance in immoveable property; and that the plaintiff had received before Gladding's death, by certain sales alleged to be simulated, a slave and some furniture, and also a check for \$700 which was recovered on the day of his death.

Notwithstanding the strenuous efforts made by plaintiff's counsel, to convince us that his client ought to be entitled to recover, that Gladding had the necessary capacity to bind himself in a valid contract; that the note sued on was given for a valuable consideration, to wit: to remunerate the plaintiff for the value of services which she had rendered to the deceased as his servant, during the space of twelve years; that as a concubine, she would even be capable of receiving a donation of moveables, to the amount of one-tenth part of

EASTERN DIS.  
February, 1841.

BARRIÈRE F.W.C.  
VS.  
GLADDING'S  
CURATOR

**EASTERN DIS** the estate; and that in supposing the note to be a disguised  
**February, 1841.** donation under the form of an onerous contract, such do-

**BARRIERE F.W.C.**

**VS.**

**GLADDING'S  
CURATOR**

A note executed in *extremis*, in favor of the concubine for a sum of money shown to have been in lieu of the value of a house and lot, which the deceased intended to bequeath, but was unable to make his will, is considered as a disposition *mortis causâ*, and not being clothed with the formalities of law, is without effect.

No disposition *mortis causâ* can be made, but by last will and testament; and when it is clearly proved, that the deceased intended to make his will, for the avowed purpose of bequeathing to his concubine certain immoveable property, but was prevented and gave his note for its value; *Held* that no recovery can be had on it.

Under the article 1453 of the Louisiana Code, "*property can neither be acquired nor disposed of gratuitously, unless by donations INTER VIVOS OR MORTIS CAUSA, made in the forms hereafter established for one or the other of these acts;*"

and according to article 1455, a donation *mortis causâ*, is defined to be "*an act to take effect, when the donor shall no longer exist, by which he disposes of the whole or a part of his property, &c. &c.*"—The article 1563 says that: "*No disposition MORTIS CAUSA shall henceforth be made otherwise than by last will or testament; all other form is abrogated.*" Now, it has been clearly proven that the deceased intended to make his will for the undenied and even avowed purpose of bequeathing to the plaintiff certain immoveable property of the value of \$4,000, and that owing to certain circumstances, principally attributable to the laudable and delicate refusal of the notary, whose motives it is not necessary to enquire into, the will could not be executed; and that in order to obviate this difficulty, it was suggested to make a note exactly corresponding to the value or amount of the intended legacy; and accordingly, about four hours before Gladding's death, and when there could not be any further hope of his recovery, he was prevailed upon to sign a note of \$4,000, payable thirty days after date, or rather thirty days after his death; the payment of which was to stand in lieu of the said intended legacy. From these facts, can it be doubted that Gladding's intention, in signing the note sued on, was to

make a disposition *mortis causá*? he and those who assisted him were aware that he could not live, and the note became the expression of what he wished to be done after his death, or in other words, *his testament; testamentum est voluntatis nostræ justa sententia de es quod quis post mortem suam fieri velit.* Considering it as such, we must conclude that the amount of this note, shown to be virtually nothing but a mere disposition *mortis causá*, cannot be recovered; and that the Judge *a quo* did not err in giving judgment in favor of the defendant.

It is therefore ordered, adjudged and decreed that the judgment of the court of probates be affirmed with costs.

EASTERN DIS.  
February, 1841.

CAPDEVIEL  
vs.  
DODD ET AL.

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CAPDEVIEL vs. DODD ET AL.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT FOR THE PARISH OF IBERVILLE, THE JUDGE OF THE SECOND PRESIDING.

Where a party has had full time to secure the attendance of his witness and a continuance refused, coupled with the declaration of the Judge *a quo*, that due diligence was not used to obtain his attendance, the judgment will not be disturbed.

In applications for a continuance much reliance will be placed in the discretion of the Judge *a quo*; and unless positive injustice has been done, his judgment will be affirmed.

This is an action on a promissory note, against the maker and endorser, given in part payment of the price of two slaves, purchased at the probate sale of the estate of plaintiffs' deceased wife; for the price of eight hundred dollars.

The defendant, Dodd, who signed the note and purchased the slaves in question, pleaded the general issue and failure

**EASTERN DIS.** of consideration. He further averred that the two slaves were  
*February, 1841.* sold with full guaranty, but one was afflicted with redhibitory  
**CAPDEVIEL** defects and diseases so as to render her useless and worth-  
**VS.** less to him. He prays that the sale be rescinded, the notes  
**DODD ET AL.** given up, and that he have judgment in reconvention for  
\$523, &c.

The other defendant pleaded a general denial, and denied that the plaintiff was the proper owner of the note sued on.

The suit was instituted the 11th of September, 1837; and was called for trial at the April term following. At the trial the defendant prayed for a continuance on the ground of the absence of one B. M'Carty, who was a material witness to prove the redhibitory vices and defects in one of the slaves, &c. The motion for a continuance was overruled. Other witnesses were examined, and the cause submitted to a jury, who returned a verdict for the plaintiff, and rejecting the demand in reconvention. From judgment rendered thereon, the defendants appealed.

*Burke & Hirriart*, for the plaintiff.

*Edwards*, for the defendant.

*Garland J.* delivered the opinion of the court.

This is a suit by the holder of a promissory note against the drawer and endorser. The defendants set up various defences, alleging the consideration of the note was part of the price of two slaves, purchased by Dodd at the probate sale of the succession belonging to plaintiff and his minor children, one of which slaves was afflicted with a redhibitory disease, of which she died some months after. Dodd also sets up a demand in reconvention, claiming \$523 for money paid plaintiff in error and for damages; he also claimed a rescission of the sale. The case was tried by a jury, who gave a verdict for the plaintiff, on which, after a refusal

to grant a new trial, judgment was rendered and the defendants appealed.

EASTERN DIST.  
February, 1841.

CAPDEVIEL  
vs.  
DODD ET AL.

When the cause was called for trial, the defendant moved for a continuance, upon the affidavit of Dodd, the statements in which, if not accompanied with the opinion of the District Judge that he had not shown due diligence to obtain the attendance of the witness, M<sup>c</sup>Carty, and some other suspicious circumstances, we should have considered sufficient. The continuance was refused and on that ground the defendants have rested their hope of having the judgment reversed and the cause remanded. The petition was served on the defendants the 13th of September, 1837, and the cause was called for trial the 20th of April following.— During all that time, the defendants seemed not to have

taken any measures to secure the attendance of the witness, or to obtain his testimony, further than to have a subpoena issued, directed to — M<sup>c</sup>Carty, commanding his appearance on the 20th of April, to testify in their behalf, which is not dated; it does not appear at what time it went into the hands of the sheriff, or what diligence was used to find the witness. The sheriff says: "B. M<sup>c</sup>Carty not found in the parish of Iberville, April 20th, 1838."— The fact of the clerk not dating the summons, and the sheriff not stating when it came into his hands or what efforts he made to find the witness create a strong presumption that none were made, which accompanied with the declaration of the Judge, that the defendants had not shown due diligence to obtain the testimony, satisfy us the continuance was properly refused. We have, in questions of this kind, to rely much upon the discretion of the District Judge and unless positive injustice has been done a party by ruling him into trial, we are not disposed to interfere on that ground alone.

Where a party had full time to secure the attendance of his witness and a continuance refused, coupled with the declaration of the Judge *a quo*, that due diligence was not used to obtain his attendance, the judgment will not be disturbed

In applications for a continuance much reliance will be placed on the discretion of the Judge *a quo*; and unless positive injustice has been done, his judgment will be affirmed.

A number of witnesses were examined at the trial, among them the family physician and overseer of the defendant,



EASTERN DIS.  
February, 1841.

LAPICE  
vs.  
CLIFTON.

also several neighbours of both parties, and after a thorough examination of the evidence, we think, had the witness been present and sworn to all the defendant says he would, there is sufficient evidence to sustain the verdict of the jury.

The case does not seem to be one that calls for our interference. The judgment of the District Court is therefore affirmed with costs.

### LAPICE vs. CLIFTON.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT FOR THE PARISH OF  
TERREBONNE, THE JUDGE OF THE FOURTH PRESIDING.

Where part of a letter is offered in evidence and objected to, if any part of it is used, the party must admit the whole of it as evidence.

Where a note is deposited as collateral security, or pledged, after *it is due*, it is subject in the hands of the depositor to all the equitable offsets, which the maker had against the original payee or holder; or which he may have, until he receives notice of the transfer.

As a general rule the endorsement and delivery of a promissory note transfers the property in it; but it is not every deposit and endorsement of a note as collateral security, that transfers such absolute property as will deprive the payee or depositor of all right and the maker of every defence he may have against it previous to notice of the deposit or pledge.

The endorsee of a draft, though only agent, may maintain an action in his own name, but it will be liable to the equities of the defendant against the real owner.

So the transfer of a note before maturity under circumstances calculated to excite a reasonable suspicion in the endorsee of legal or equitable defences on the part of the maker, will not preclude evidence of such equities or defences, in an action by the endorsee.

A note must be transferred in good faith, in the ordinary course of business, before maturity and without any circumstances to induce a reasonable belief of the existence of such equities or defence, to preclude evidence of them by the maker.

I. 8m 213  
30VS 452  
60VS 533  
92N 520

This is an action by the endorsee against the maker of a EASTERN DIS.  
February, 1841.  
promissory note, endorsed in blank by the payee, and duly  
protested for non-payment.

LAFITE  
VS.  
CLIFTON.

The defendant denied that the plaintiff was the legal owner and holder of the note, but that it was endorsed to him and placed in his hands by R. J. Walker the payee, who was the true owner, as collateral security or for the purpose of conveying to him a conditional interest on his having to pay certain sums of money for which he had become bound for Walker, and which condition has never accrued, &c. That the plaintiff cannot avail himself of the transfer and prosecute this suit without subjecting himself to the equities existing between the respondent and Walker; for if the condition on which plaintiff took the note has at all happened it is since its maturity, which subjects him to all the equities subsisting between the original parties. He then pleads payment to Walker and prays judgment in his behalf.

Upon these pleadings and issues, the case was tried.

The facts concerning the transfer and deposit of the note in question with the plaintiff, are fully detailed in the opinion of this court.

On a full examination of all the evidence adduced on the trial, the District Judge gave judgment for the defendant and the plaintiff appealed.

*Winchester*, for the plaintiff, insisted in argument that the note was transferred to the plaintiff before it was due, who was the legal holder and had it protested for non-payment. It remained in his possession ever since, and the right to sue and recover on it could not be affected by any settlement of accounts between him and Walker, by which it was subsequently agreed that the plaintiff should hold it as collateral security. It was negotiable in its form and transferred by endorsement to the plaintiff before maturity; therefore it is not

EASTERN DIS. subject to any equities or defence between the original holder, February, 1841. Walker, and the defendant.

LAPICE  
vs.  
CLIFTON.

*Beatty*, for the defendant. The mere endorsement of a note even with delivery does not confer such a right on the holder as exempts him from the equities between maker and payee; unless he actually becomes owner or receives it in pledge according to law.—2 La. Rep., 386, 363; 4 idem, 220, 5 idem, 48, 487.—2 Martin, N. S. 247.

2. The plaintiff did not receive the note as owner, but only as the agent of Walker; nor was it legally pledged by Walker, who was a good witness to prove payment and other equities between the original parties.—5 Martin, N. S., 142; Chitty on Bills, 204-5; 4 Martin, N. S., 539.

*Garland, J.* delivered the opinion of the court.

In August, 1836, Robert J. Walker, of Mississippi, sold to the defendant a large property in land and slaves, situated in the parish of Terrebonne, and to secure the payment of the price took from him ten notes, amounting to \$190,000, falling due at different periods, among which was one for \$17,500, drawn to order, payable March 1st, 1839, at the Union Bank of Louisiana. In April, 1837, the plaintiff having made advances to and come under acceptances for Walker to a large amount, received from him as collateral security, notes amounting to upwards of \$67,000, and among them the note just mentioned, endorsed in blank. In the agreement entered into between Walker and the plaintiff, it is stipulated the notes are left with the latter as security to him for specified notes and acceptances, and further, that Lapice may hold or negotiate them towards taking up his liabilities for Walker. Lapice kept the note in his possession until it became due, when his agent had it protested for non-payment; a demand being made at the Bank where the note was payable, the defendant not being present. It is not shown that Walker had notice of this protest, to hold

him liable as endorser, or that defendant was notified of the transfer until after the note was due. On the 26th of April, 1839, Lapice and Walker had a settlement of their accounts and the balance against the latter was \$50,081 31, for which he gave his note, payable one day after date, with interest, and at the foot of the account, it is stipulated, "that to secure the payment of the above note, said P. M. Lapice holds as collateral security certain notes described in an agreement between him and R. J. Walker, dated April 26th, 1837, made by duplicate, and a certain receipt of Howell & Johnson for sixteen notes, amounting to \$31,939 93, dated April 6th, 1839, and no suit is to be brought on said note of said Walker of this date till after the expiration of eighteen months from this date." This agreement is signed by Lapice alone, but attached to it with a wafer, is a paper of the same date, signed by Walker, which says "if after the payment of my above note of \$50,081 31, there should remain any balance in my favor from the collateral paper of mine now held by Peter M. Lapice, said Lapice may appropriate said balance towards an acceptance of his on my account, now held by Mr. Thomas Henderson for the Bank of the United States."

*EASTERN Dis.  
February, 1841.*

LAPICE  
VS.  
CLIFTON.

On the 7th May, 1839, eleven days after the transaction with Lapice, Walker gave the following receipt or instrument in writing:

"The note of L. K. Clifton to me for \$17,500, due 1-4 March, 1839, is to be obtained and delivered by me to L. K. Clifton, on my return to Natchez; the same being discharged as per settlement of this date.—Jackson, Mississippi, May 7th, 1839."

(Signed)

R. J. WALKER."

The agent of the defendant, who made the settlement, says that the receipt was given in discharge of the note falling due 1st March, 1839. The items of payment for which the receipt was given, were claims to the amount of

**EASTERN DIS.** about \$12,000, assumed by Walker in the sale from him to February, 1841.

**LAPICE  
vs.  
CLIFTON.**

Clifton, which the latter was compelled to pay, as Walker had failed to do so. The balance was paid by a draft and in cash.

Lapice refused to give up the note to either Walker or the defendant, and instituted this suit on it. The defendant presents various defences, there are several bills of exceptions in the record, and a mass of testimony in relation to the transactions of Walker and defendant, and of the former with the plaintiff. But the whole matter resolves itself into the question whether Lapice has such a property in the note as will prevent Walker's discharge of it from taking effect and preclude the equitable defences of the defendant.

The note was endorsed before maturity and put into plaintiff's hands to indemnify him against certain liabilities, after the note became due; Walker and the plaintiff had a settlement in relation to these matters and some others, when the transaction assumed the character of a debt from Walker to Lapice, and it was then agreed that the note in controversy, then due and protested for non-payment should stand as collateral security for that debt, which was not to be sued for until the expiration of eighteen months. The pledge or deposit of the note made in April, 1837, was annulled and a new contract entered into two years after. The note was then the property of Walker, as Lapice acknowledged by receiving from him a new deposit of it as collateral security for a new debt, and being due, it was subject to all the equitable off-sets the defendant had against it in the hands of Walker or that he might have obtained until he had notice of the transfer. That notice it does not appear, was given at any time previous to the discharge.

Where a note is deposited as collateral security, or pledged, after it is due, it is subject in the hands of the depositor to all the equitable off-sets, which the maker had against the original payee or holder; or which he may have, until he receive notice of the transfer.

The counsel for the Plaintiff says the defendant had notice of the transfer, as Walker in his letter of the 20th of July, 1839, to him, says "a reference to my previous letters will show that I apprised you this note was in the

hands of Lapice, for I requested you to make him a payment on account of it." The whole of this letter is objected to as evidence by the plaintiff, and if any part of it is to be used by him, he must take all, and in another part of it, he will find Walker says, "the note, though in Mr. Lapice's possession, was never transferred to him," which would be decisive of the question, if the letter is to be considered as evidence. But Walker's expression of having informed the defendant is so vague that we cannot take it as a notice of transfer before the maturity of the note.

EASTERN DIS.  
February, 1841.

LAPICE  
vs.  
CLIFTON.

Where part of a letter is offered in evidence and objected to, if any part of it is used the party must admit the whole of it as evidence.

In the new agreement entered into in 1839, no special authority is vested in Lapice to negotiate the notes in his hands as was given him by that made in 1837, and it is fair to presume, from the omission of so important a clause, that there was some change of intention between the parties.

As a general rule the endorsement and delivery of a promissory note transfers the property in it; but it is not every deposit and endorsement of a note as collateral security, that transfers such absolute property as will deprive the payee or depositor of all right and the maker of every defence he may have against them, previous to notice of the deposit or pledge.—2 La. Rep., 361, 386. In the case of Perry vs. Gerbeau and wife, 5 Martin, N. S., 16, it was held that the fact of a bill or note being payable to and endorsed by a particular person is in many instances only *prima facie* evidence of a legal interest. See West vs. Wilson, 4 La. Rep., 220, it was decided the endorsee of a draft, though only agent, may maintain an action in his own name; but it will be liable to the equities of defendant against the real owner.—See also 4 idem, 533.

The endorsement and delivery of a promissory note, as a general rule, transfers the property, but the rule is subject to many exceptions, and we cannot admit every deposit and endorsement of notes as collateral security, as transferring such an absolute property in them, as to deprive the payee or depositor of all right and the maker of every defence he may have against them, previous to notice of the deposit or pledge.—2 La. Rep., 361, 386. In the case of Perry vs. Gerbeau and wife, 5 Martin, N. S., 16, it was held that the fact of a bill or note being payable to and endorsed by a particular person is in many instances only *prima facie* evidence of a legal interest. See West vs. Wilson, 4 La. Rep., 220, it was decided the endorsee of a draft, though only agent, may maintain an action in his own name; but it will be liable to the equities of defendant against the real owner.—See also 4 idem, 533.

In the case of Maurin vs. Chambers et al., decided in the Western District in October last and reported in 16 La. Re-

x 4m 666. 7m 287. 1m 301. 373. 6m 45-  
7m 253. 12m 93. 96. 15m 265. 16m 215  
9m 156



**EASTERN DIS.** ports, 207, was held the transfer of a note before maturity, under circumstances calculated to excite a reasonable suspicion

*February, 1841.*

**GRANT**

*vs.*

**FIOL ET AL.**

So the transfer of a note before maturity under circumstances calculated to excite a reasonable suspicion in the endorsee of legal or equitable defences on the part of the maker, will not preclude evidence of such equities or defences in an action by the endorsee.

A note must be transferred in good faith, in the ordinary course of business, before maturity and without any circumstances to induce a reasonable belief of the existence of such equities or defence, to preclude evidence of them by the maker.

in the mind of the endorsee of legal or equitable defences on the part of the maker, would not preclude evidence of such equities or defences in an action instituted by the endorsee against the maker.

To preclude the legal or equitable defences of the maker the note must be transferred in good faith, in the ordinary course of business, before maturity, and without any circumstances to induce a reasonable belief of the existence of such equities or defences.

Upon a full examination of this case, we think Walker had such legal interest in the note sued on, as authorised him to give a discharge, which being established judgment must be given in favor of the defendant.

The judgment of the District Court is therefore affirmed with costs.

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**GRANT vs. FIOL ET AL.**

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

4 N 241 The taking of a mortgage on a vessel by notarial act, to secure loans or notes due by the owner on account of the vessel, does not confer any right or privilege whatever; ships not being susceptible of mortgage.

So a creditor for advances or loans in money made to the owner, and applied to the use of the vessel, has no privilege allowed him by law.

Attaching or seizing creditors are entitled to a preference over ordinary creditors; and over each other according to the order of their seizures.

EASTERN DIS.  
February, 1841.

Claims for towage are not entitled to privilege, it not being expressly allowed by law.

GRANT  
VS.  
FIOL ET AL.

This is an action on four promissory notes executed by the defendant Fiol, in 1836, amounting to \$3,750, and to secure payment thereof, he hypothecated or mortgaged the schooner Cora, then in his possession and use.

The notes were all protested at maturity, and this suit instituted for their recovery by attaching said schooner, in February, 1837; the defendant having then left the state. The schooner was seized and sold under the proceedings thus commenced, and the proceeds of sale amounted to \$3,895 75, in the hands of the sheriff.

Several claimants whose debts amounted to more than the proceeds, came forward, made opposition, and each one claimed to be paid by privilege and preference.

The schooner made a voyage by leaving New-Orleans the 8th December, 1836, and returning the 11th February, 1837. Pascal claims 104 dollars for ship chandlery furnished her, between the 25th November and 8th December, 1836.

Sloo & Byrne claim 800 dollars which is shown to have been furnished and applied to procuring sails, provisions, and paying ship carpenters.

The Louisiana Tow-Boat Company claimed \$107 90 for towage, for which they claim a privilege of the first rank.

The plaintiff's claim was for advances made on the original price of the vessel, and for which he took a mortgage by notarial act, on the schooner.

The District Judge ranked the privileges by first allowing the costs; second, Pascal's claim; third, the Tow-Boat Company; fourth, Sloo & Byrne's claim, and lastly, the plaintiff and attaching creditor was allowed the remainder of the proceeds. He appealed.

EASTERN DIS.  
February, 1841.

GRANT  
VS.  
FIOL ET AL.

*Roselius*, for the plaintiff.

*Macready*, for Pascal.

*Carter & Duncan*, for the Tow-Boat Company.

*Hoffman*, for Sloo & Byrne.

*Morphy J.* delivered the opinion of the court.

This controversy is in relation to the distribution of the proceeds of the schooner *Cora*, seized and sold at the suit of the plaintiff under our attachment laws; after a judgment had been rendered in his favor for three thousand seven hundred and sixty-two dollars, with privilege on the property attached, several persons intervened claiming to be paid in preference to plaintiff, for supplies, towage, &c. The proper course to be pursued by these parties at this stage of the proceedings should perhaps have been that pointed out by article 401, of the Code of Practice, under the head of opposition of third persons, but this proceeding not having been objected to, we shall pass on to the merits of the several claims set up by the intervenors. That of *Rodriguez & Co.*, has been rejected below, and they do not appear before us as appellants from that decision. A claim of one hundred and four dollars and ten cents, for ship chandlery, put in by *F. Pascal*, was allowed below as a privilege and is not disputed in this court. *Sloo & Byrne*, claim a privilege for eight hundred and fifty dollars,

The taking of a mortgage on a vessel by notarial act, to secure loans or notes due by the owner on account of the vessel, does not confer any right or privilege whatever; ships not being susceptible of mortgage.

by them loaned to the defendant as owner of the schooner and which they allege has been applied to the payment of the ship carpenter, sail maker and crew of the schooner in order to enable her, by the payment of these claims, to prosecute her intended voyage; and they exhibit a special conventional mortgage on the schooner executed to them by the owner before a notary public. The attaching creditor also produces a mortgage prior in date to that of *Sloo & Byrne*, but in the same form. We will leave both mortgages entirely out of view; because under the decision of this court in *Malcolm*, et

al. *vs.* The schooner Henrietta, 7 La. Rep. 490. They can confer no right or privilege whatever. It is contended on the part of the intervenors, that their money having been advanced for, and applied to, the necessities of the schooner must be considered as *supplies* within the sense of the meaning of No. 8, article 3204, of the Louisiana Code. Admitting the sufficiency of the testimony to establish the claim itself; and passing over the doubts which arise from the contradictions in it as to the application of the money loaned to defendant, we are clearly of opinion that these intervenors are not entitled to a privilege. The article referred to recognizes a privilege in sellers, those who furnished materials and workmen employed in the construction, *if the vessel has never made a voyage; and creditors for supplies, &c., previous to the departure of the ship, if she has already made a voyage.* The article contemplates two cases in which the privilege exists and points out the circumstances under which it must in each case be exercised; but the persons in whose favor it is established are the same in both branches of the provision, and the expressions used in the first would remove all doubts, if any could exist, as to the meaning of those found in the record; especially when reference is had to article 289, of the Code of Practice, which regulates the manner in which this privilege is to be claimed. The word *supplies (fournitures)*, clearly refers then, not to money or funds advanced, but to materials sold or furnished. At the time this loan was made to the defendant by the intervenors, no privilege, attached to the debt. This they appear to have been fully aware of themselves, when they attempted to obtain a lien on the vessel by taking a mortgage before a notary. The subsequent use made of this money by the defendant, did not surely place them in a better situation; it did not operate in their favor a legal subrogation to the rights of the person, entitled by law to the privilege, and it is not pretended that any conventional subrogation took place; La. Code, article 2156 and 2157. This claim then is an ordinary one for money

EASTERN DIS.  
February, 1841.

GRANT  
VS.  
FIOL ET AL.

So a creditor for advances or loans in money made to the owner, and applied to the use of the vessel, has no privilege allowed him by law.

**EASTERN DIS.** lent to the defendant and must be postponed to that of the  
**February, 1841.** plaintiff who as a seizing creditor; and under his judgment  
**STETSON** has a privilege on the property attached. Code of Practice,  
**AVERY & CO:** 722, 723, 724. 3 La. Rep. 183.  
**vs.**  
**GURNEY:**

The demand of the Louisiana Steam-Tow-Boat Company,

Attaching or for towage, now remains to be considered. We have looked  
 seizing credi- in vain for any provision in the Code by which the privilege  
 tors are entitled claimed for it can be supported. However strong may be the  
 to a preference over ordina- analogy between the services rendered by these claimants  
 ry creditors; and over each and those of pilots; and however reasonable it might appear  
 other, accord- ing to the order of their seizures. to us that they should enjoy the same privilege, we do not feel  
 ourselves authorized to create it in their favor. A privilege

Claims for towage are not entitled to privilege, it not being expressly allowed by law. exists only where it is expressly given by the Code, article  
 3152. If the means for its being granted appear to the  
 authority competent to establish it as strange as they do to us,  
 they will no doubt give it in express terms. Privileges are  
*stricti juris*, and cannot be extended by implication or analogy.

It is, therefore, ordered, adjudged and decreed, that the  
 judgment of the court below be so amended as to allow only  
 the claim of F. Pascal, as a privilege to be paid in preference  
 to plaintiff; the appellees to pay the costs of this appeal.

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**STETSON, AVERY & CO. vs. GURNEY:**

**ROBERTSON Intervener.**

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.**

Between principal and agent, whenever the former can *identify* his property, or  
 its proceeds in the hands of his factor or agent, he is entitled to recover it.  
 But money, the mere representative of value, cannot be identified and re-claim-  
 ed as goods or property. When money is advanced to an agent to be employ-  
 ed in the purchase of cotton; &c., the latter becomes indebted for that amount  
 and the relation of debtor and creditor exists between them.

So where R advanced money to G a broker, to buy cotton, and the latter deposited the money in bank to his own credit, which was in part seized by one of his judgment creditors:—*Held* that it was rightfully seized. Money deposited in bank cannot be identified, and is in fact a debt due the depositor by the bank.

EASTERN DIS.  
February, 1841.  
ROBERTSON  
AVERY & CO.  
VS.  
GURNEY.

An agent, interested only to the amount of his commissions is a competent witness for his principal; but when his interest is distinct, and not growing out of his agency he is incompetent.

In this case, the plaintiffs having seized the sum of \$8,000, which was deposited to the credit of the defendant, Gurney, in the Canal Bank, W. H. Robertson made opposition and claimed the money as belonging to him, and on deposit with the defendant as his cotton broker. He took a rule on the plaintiffs to show cause why the seizure should not be set aside, and the money delivered up to him.

On the trial of the rule it was shown that Robertson had made large advances of money to Gurney as broker to buy cotton for him, and on his account and for which regular commissions were allowed. The defendant deposited the money in bank to his own credit; and at the time of the seizure, had \$62,000, and withdrew the balance by a check. When he drew the balance out of bank he retained his commissions out of it. The commissions still due, were estimated at \$1,750.

The testimony of Gurney himself showed the above results, which was objected to on the ground that he was an incompetent witness on the score of interest and a party to the record in the suit.

The plaintiffs were judgment creditors of Gurney, and the seizure was made under execution.

The District Judge, on the testimony of Gurney, the defendant in execution, was of opinion only the amount of his commissions was liable to seizure, amounting to \$1,750, and that the balance was money belonging to Robertson, who had only advanced it to Gurney to buy cotton. The rule was therefore made absolute, allowing Robertson all but the commissions to which Gurney was entitled; this being considered his own funds. The plaintiffs appealed.



EASTERN DIS.  
February, 1841.

STETSON,  
AVERY & CO.  
VS.  
GURNEY.

*Lockett*, for the plaintiffs contended that it was incumbent on Robertson to show that this was his indetical money that was seized; that is, that the money seized was *his in right of property* and *identify* it as such; unless this was shown there is nothing on which to rest his claim.

*L. C. Duncan*, for the claimant, Robertson, insisted that it was absurd to identify the very bank notes given to Gurney and by him deposited in bank. Such extreme nicety of proof of identity is not required and is in fact repudiated. All that can be expected, is to prove property. So it was decided by Judge Story; and the principle settled is, that "the produce or the property ought to belong *to the owner*, if it can be distinguished from that of the factor." 3 Mason, 242.

2. In this case the property in the deposit or money at Gurney's credit, is clearly distinguished as belonging to Robertson. Gurney was insolvent and in the prison limits, and was so embarrassed as to be unable to get any sum of his own or keep money in his own name for any time. He is a cotton broker, and in the space of 15 days he deposits \$310,000 in one bank; this proves the money was not his, but on the contrary it is proved that it was advanced to him by Robertson to purchase cotton as a cotton broker. This entire sum, with the exception of the sum seized by the plaintiffs, was paid out to cotton vendors.

*Bullard J.* delivered the opinion of the court.

The facts which are shown by undoubted evidence in the present case are, that Stetson and Avery having obtained a judgment against Gurney, a cotton broker, levied an execution upon a sum of \$8,000, standing to the credit of their debtor in the Canal Bank. Robertson of Mobile alleging that the fund belonged to him, took a rule on the plaintiffs to show cause why the seizure should not be set aside and the money returned to him. It appears that Robertson had confided to Gurney, as a broker, a sum of \$350,000, to be

invested in cotton, a part of that amount was deposited by Gurney in the Merchants' Bank, to wit: \$50,000 to his credit as agent. That amount was soon drawn out and his deposit was made as it appears by his Bank Book, on the 13th of November. On the following day Gurney deposited in his own name in the Canal Bank ten thousand dollars in City notes, and in the course of the month he made deposits amounting in all to three hundred and ten thousand dollars.

The District Court being satisfied with the proof of the identity of the money gave judgment against the seizing creditors, and released it from seizure except for the estimated amount of the broker's commissions; and the plaintiffs appealed.

The counsel for Robertson relies upon the principle well settled between principal and agent, that whenever the former can identify his property or its proceeds in the hands of his factor he is entitled to recover it; or to use the language of Judge Story in the case relied upon in the 3rd. Mason's reports:—"Nothing is better settled at this present day than the doctrine that the principal is entitled to recover whenever he can trace his own property and distinguish it or its proceeds from the mass of the property of the factor."—3 Mason 235.

The case above referred to was this:—The plaintiff had consigned property for sale to Winslow, Channing & Co. who sold it and took negotiable notes payable on time in their own names for the amount. Before the notes fell due, they failed and assigned their property to the defendants, as assignees for the benefit of their creditors, and among other property were the notes in question. The assignees received payment of the notes and the action was brought to recover the amount so raised, deducting commissions. The Circuit Court of the United States held that the commissions were entitled to recover.—Judge Story in pronouncing the opinion of the court made use of the language above quoted, and pro-

EASTERN DIS.  
February, 1841.

STETSON  
AVERY & CO.  
ES.  
GURNEY.

Between principal and agent, whenever the former can identify his property, or its proceeds in the hands of his factor or agent, he is entitled to recover it.

**EASTERN DIS.** ceased as follows:—"If it (the property) has been sold and February, 1841.

**STETSON,  
AVERY & CO.  
vs.  
GURNEY.**

notes taken in payment, and these can be specifically ascertained, they remain the property of the principal and he has a right to receive them, discharging at the same time any lien of the factor."—The Judge afterwards remarks: "Must not the instrument which merely evidences but does not extinguish the debt follow the nature of its principal. If the owner is entitled to the debt is he not entitled to that which was taken to evidence it? I meddle not with the fact that here there were negotiable instruments. If they had been negotiated and the money received by the factors in the course of business, that would have deserved a very different consideration."

The same doctrine is laid down by chancellor Kent, and he adds that "the same rule applies to the case of a banker who fails possessed of his customer's property. If it be distinguishable from his own, it does not pass to his creditors, but may be reclaimed by the true owner, subject to the heirs of the banker upon it." 2 Kent's com., 624.

That these are the principles which govern the relations of consignor and factor or agent cannot be doubted. But we are of opinion that when money is confided to an agent to be employed in purchases, the case is quite different. Goods

But money, the mere representative of value, cannot be identified and re-claimed as goods or property. When money is advanced to an agent to be employed in the purchase of cotton, &c., the latter becomes indebted for that amount and the relation of debtor and creditor exists between them. consigned are susceptible of being identified and distinguished from those of the factor. They remain the property of the consignor. The factor has no right to pledge them or to use them in any way for his own purpose. They may be followed and reclaimed in the hands of third persons. He has only a right to sell. But money, the mere representative of value cannot be identified. When Robertson confided a sum of money to Gurney to be employed in the purchase of cotton, the latter became indebted to him in that amount. The relation of debtor and creditor arose between them, not that of depositor and depositary. If Gurney had died or had become a declared insolvent, Robertson would not have been recognized as a privileged creditor. The money was not destined

to be kept and restored but to be employed. In the case of **EASTERN DIS-**  
**Longbottom's** executors we held that money confided to an **February, 1841.**  
 agent to be disbursed did not constitute a deposit.—That the  
 agent was bound to account for it but not to restore it; and  
 that the article 3189 of the Code did not apply to such a  
 case. 9 La. Rep. 44. If Gurney had lent a part of the sum  
 in question to a friend and taken his note, and that note had  
 gone into the hands of his syndics in the case of failure, we  
 think it clear that Robertson would not be entitled to recover  
 it or its proceeds if paid to the syndics, and equally clear that  
 a debt due by Gurney to the borrower might be set up in  
 compensation. When the money was placed in bank without  
 any notice of the claims of Robertson, it was not the identical  
 money which the bank was bound to restore, it did not consti-  
 tute in a legal sense a deposit. If the bank had failed, any  
 debt due by Gurney to it would have been an offsett against  
 his claim on the bank, and if the bank had been burned it  
 would have remained the debtor of Gurney for the amount.—  
 On the other hand if Robertson had become the creditor of the  
 bank the latter could have had no right to plead Gurney's de-  
 posit of his money in compensation.

No adjudged case has been cited to satisfy us that money  
 confided to an agent can be followed and reclaimed in the hands  
 of third persons without notice. The case of the banker  
 mentioned in the passage from the 2d. Kent's commentaries  
 must have been one relating to commercial paper deposited  
 for collection, and not of money. To let in evidence of the  
 identity of a sum of money under such circumstances, would  
 open too wide a door to fraud and collusion. It was not in  
 truth a sum of money which was seized, it was Gurney's  
 credit in the bank, or in other words a debt due to him by the  
 bank, and if it be true that commissions were due him by  
 Robertson to be paid out of the same money, then the money  
 of Robertson was blended with his and cannot be identified.

Gurney was admitted as a witness and a bill of exceptions

STETSON  
 AVERY & CO.  
 VS.  
 GURNEY.

So where R  
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 is in fact a debt  
 due the deposi-  
 tor by the bank.

**EASTERN DIS.** taken. If the only objection to him was that he was the agent  
*February, 1841.*

**ANDERSON**  
*vs.*  
**DINN.**

An agent, interested only to the amount of his commissions is a competent witness for his principal; but where his interest is distinct, and not growing out of his agency he is incompetent.

of Robertson and interested to the amount of his commissions, he would be clearly admissible. The law is well settled on that point. But in this case the agent has an interest distinct from his commissions, and not growing out of his agency. He is a party to the record and although not strictly a party to the rule, yet he has clearly an interest in retaining a control of the fund and saving himself from litigation with the present claimant. The court in our opinion erred in admitting him as a witness.

The judgment of the District Court is therefore reversed, and ours is that the rule be discharged with costs in both courts.

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**ANDERSON vs. DINN.**

**APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.**

Where the adverse party is notified by a rule before trial, to show cause why certain depositions shall not be read, and no valid objection is made, it is too late at the trial to have them excluded, although there are glaring defects in them.

Where the verdict substantially settles all the points in controversy, it will be deemed sufficient, although it may not technically embrace each issue arising out of the pleadings.

If the judgment be different from the verdict, it is not a cause for a new trial, or to remand the case. It will be amended so as to conform to the verdict.

A contract for *Morus Multicaulis* trees partly executed is rescinded, and money paid, returned, on account of the imposition in delivering spurious trees.

This is an action on a promissory note for six hundred dollars executed by the defendant, payable on the 23d April, 1839.

The defendant admits his signature but denies that he is in any manner indebted to the plaintiffs. He expressly avers a failure of consideration of the note; and states that it, together with nine others, were given in pursuance of a contract for the delivery of a quantity of *Morus Multicaulis* trees, amounting in all to \$5570; that six of these notes making an aggregate of \$3600 have been paid; the seventh one now in suit, and four others not yet due. He further states that he had paid these notes before he discovered the trees were not of the kind ordered and contracted for, and which were guaranteed; that he was misled by the statements and guaranty of the plaintiffs, and signed said contract through error. He further states that soon after he was informed that these trees were not *Morus Multicaulis*, he gave the plaintiffs notice in writing that he should hold them responsible in damages, and that he was ready to deliver back the trees he had received to any person the plaintiffs might select; or give directions to the person he sent them to for sale, to dispose of them according to plaintiff's orders, and prays that this suit be dismissed.

EASTERN DIST.  
February, 1841.

ANDERSON  
vs.  
DINN.

The defendant now assumed the quality and character of plaintiff in reconvention, and prays judgment over against the plaintiffs in the sum of \$8600 in damages for the impositions, vexations, expenses, &c., growing out of the non-compliance with, and imposition of the contract for the trees; and also that they may be required to refund him \$3600, the amount of his notes by him paid and taken up; and that those remaining unpaid be sequestered and given up.

These pleadings and issues formed the principal and material demands on both sides, and upon which the cause was tried before a jury.

The facts material and comprising the evidence of the case are stated in the opinion of this court; as also the form and character of the verdict and judgment. The defendant had a verdict and judgment rejecting the plaintiffs' demand and



EASTERN DIS. allowing him \$3600 for amount of the notes he had paid  
February, 1841.

ANDERSON  
VS.  
DINN.

and the surrender of the others; and also rescinding the contract for the *Morus Multicaulis* trees; directing all remaining unsold to be given up. The plaintiffs appealed.

*G. B. & L. C. Duncan*, for the plaintiffs.

*Anderson & Elwyn*, for the defendant.

*Garland, J.* delivered the opinion of the court.

The plaintiffs commenced three suits on four promissory notes given by defendant, amounting to \$1970, payable at different periods, which being consolidated the defence is the same in all, though there are different answers in the record. The defendant says the consideration of the notes, as well as several others given by him to plaintiffs and paid, was a large quantity of trees sold by them and warranted as the *Morus Multicaulis*, which he says proved to be different kinds of the mulberry tree of little or no value, wherefore there has been a failure of the consideration of the notes, which he prays may be annulled; he also sets up a demand in reconvention, claiming \$3600 cash, which he had paid the plaintiffs on account of the purchase previous to his discovery of the imposition, and a large sum for damages and loss of profits.

We have carefully examined the voluminous record and find the plaintiffs were importers from France of a large number of plants or slips, which they represented to be the *Morus Multicaulis*, and sold to the defendant for \$5570, payable \$600 cash, and the balance secured by eight notes for \$600 each and one for \$170, falling due at different periods. Five of these notes were paid. The plants or slips were delivered in boxes and packages, a large quantity resold in New Orleans, a number in Mobile and a portion shipped to New York to dealers in trees and shrubs. Upon their arrival at the latter place the consignees discovered they were not the

genuine *Morus Multicaulis*, and soon after, the persons to whom the defendant had sold here and at Mobile, having planted them, found that many would not vegetate at all, and such as grew, proved to be the white or Italian mulberry. Those to whom he sold on credit refused to pay him and some who had paid for them, called on him to refund the money and some of the witnesses say they claim damages. The evidence satisfies us the sale of the pretended *Morus Multicaulis* plants was the consideration of the notes, that the plaintiffs warranted them to be genuine. and there cannot be a doubt that they were themselves mistaken and imposed on, or they wilfully deceived the defendant.

The case was submitted to a jury who say that "in the main action we, the jury, find a verdict for defendant, Dinn. In the action in reconvention we, the jury, find for William Dinn, as plaintiff, the sum of thirty-six hundred dollars cash, against the defendants, H. & W. Anderson, and that William Dinn's unpaid notes be surrendered up to him, and defendants, Anderson, to receive from Dinn an order on Garretson, Flushing, L. I., for the trees." Upon this verdict after an ineffectual attempt on the part of the original plaintiffs to obtain a new trial, a judgment was rendered in the main action in favor of Dinn, and in the reconventional demand it is adjudged he recover against H. & W. Anderson, \$3600, and the notes sued on are cancelled and ordered to be given up; it is further ordered that Dinn file in court, his order on Garretson, the consignee of the trees in New York, to deliver them to Anderson, for the benefit of whom it may concern.

This judgment the appellants ask us to reverse on various grounds and remand the case for a new trial. Our attention is first called to a bill of exception taken by the plaintiffs to the opinion of the court permitting two depositions to be read by defendant to which they objected on the ground that all the cross-interrogatories were not answered by the witnesses. It appears they were not all answered, and if the counsel of Dinn

EASTERN DIS.  
February, 1841.

ANDERSON  
VS.  
DINN.

**EASTERN DIS.** had not taken a rule on the plaintiffs previous to the trial, to  
February, 1841. shew cause why the depositions should not be read, which was  
**ANDERSON** made final, it is certain the depositions must have been ex-  
**vs.** cluded in accordance with the previous decisions of this court.  
**DINN.**

6 Martin, N. S., 313—13 La. Rep., 109. It appears to us  
 that the 17th section of the act of March 20th, 1839, includes

Where the ad-  
 verse party is  
 notified by a rule  
 before trial, to  
 show cause why  
 certain deposi-  
 tions shall not be  
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 id objection is  
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 late at the trial  
 to have them ex-  
 cluded although  
 there are glaring  
 defects in them.

such an irregularity as the one under consideration. If the  
 justice of the peace neglected or refused to take down the an-  
 swer of the witness, it is an irregularity in the execution of the  
 commission, as well as an omission of duty, which we think  
 ought to have been enquired into under the rule taken. The  
 defendant was no doubt aware of the objection and having  
 given his adversaries an opportunity of availing themselves of  
 it, and they not doing so, we concur with the court below  
 in the opinion that the objection came too late.

It is objected that the verdict is bad as it does not cover all  
 the issues between the parties. That it is special, and omits to

Where the ver-  
 dict substantial-  
 ly settles all the  
 points in contro-  
 versy, it will be  
 deemed suffi-  
 cient, although  
 it may not tech-  
 nically embrace  
 each issue aris-  
 ing out of the  
 pleadings.

find for the plaintiffs or the defendant all the matters in contro-  
 versy. We have examined it carefully and compared it with  
 the issues, which at first seem confused, in consequence of  
 the number of answers filed before the suits were consolidated,  
 but we cannot detect the discrepancy. It is true the verdict  
 does not technically take up each question or issue as at first  
 presented, but it substantially settles all the points in contro-  
 versy. In the main action, which we understand to be on the  
 notes, the finding is for the defendant generally, the reconven-  
 tional demand is then decided in terms sufficiently precise to  
 shew the points settled by it. The insertion of the word *cash*  
 in the verdict seems to be surplusage, as it would have been  
 intelligible without it. We do not understand it as limiting the  
 finding to the money actually paid, but as covering the issue  
 made as to the damages also.

After the closest scrutiny, we are unable to discover any  
 material variance between the verdict and the judgment as is  
 alleged. They conform in every particular, and nearly so in

the language used. But if the judgment be different from the EASTERN DIS. February, 1841. verdict, it is not a cause for a new trial if the latter be correct; we should do no more than amend the judgment so as to make it conform to the verdict, but we do not find that necessary.

ANDERSON  
vs.  
DINN.

It is said the defendant recovers more than he claims in re-  
convention. That is a mistake. He claimed upwards of  
\$8600, and the verdict and judgment are for less than half  
that sum.

If the judgment be different from the verdict, it is not a cause for a new trial, or to remand the case. It will be amended so as to conform to the verdict.

The appellants say they should have credit for about \$2200  
for genuine trees sold in Mobile. The evidence shews that no  
genuine plants or trees were sent to Mobile at all. The defendant  
ought not to pay the plaintiffs the money for which the  
spurious trees were sold, as he is responsible to the purchasers  
for it, and it is shown that in several cases, they have reclaimed  
it with damages. The only genuine trees in the whole lot  
were something over four thousand sent to Garrettson in New  
York; for them as well as others in his hands, Dinn has given  
an order to deliver them to plaintiffs. They are yet in existence,  
as Garrettson says he planted them on account of whom  
it might concern and is ready to give them up on the payment  
of his expenses.

A contract for Morus Multi-caulis trees partly executed is rescinded, and money paid, returned, on account of the imposition in delivering spurious trees.

The equity of the case is we think strongly in favor of the defendant.

The judgment of the Commercial Court is therefore affirmed with costs.

EASTERN Dis.  
February, 1841.

SCHUBER vs. BOSGEREAU.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

SCHUBER  
vs.  
BOSGEREAU

An affidavit, which declares that the facts in the petition stated as within his knowledge are true and those not so stated he believes to be true, is sufficient to maintain an injunction; but it should be distinctly stated in the petition the facts which are within his knowledge and those which he has only reason to believe.

This case commenced by injunction, restraining an order of seizure and sale.

The plaintiff alleges that the transfer of the notes on which the defendant was proceeding against his property was made by the payee after the same were due; or if transferred previous, were so transferred without consideration, solely for the purpose of collection and in fraud of the rights of petitioner as between vendor and vendee; that when he purchased the property for which these notes were given, he had no knowledge of the existence of any claim adverse to the title of the vendor and that he purchased under full warranty of title; but that he is disturbed by the Poultney suit and in danger of eviction; whereupon he prays that an injunction issue restraining said order of seizure until the further order of this court.

The affidavit states, "that all the facts in the foregoing petition stated as within his knowledge are true, and those not stated as within his knowledge he believes to be true."

There was a rule taken by defendant on the plaintiff to dissolve the injunction on the insufficiency of the affidavit.

There was judgment dissolving the injunction with 100 dollars special damages and ten per cent. interest, &c. The plaintiff appealed.

*Hoffman*, for plaintiff.

*Mace*, contra.

*Morphy J.* delivered the opinion of the court.

The appellant complains of the dissolution of an injunction

on the ground of the insufficiency of the affidavit he had made to obtain it. His oath was, "that all the facts in the petition stated as within his knowledge are true, and those not stated as within his knowledge he believes to be true." This affidavit was made in strict accordance with the form suggested as the proper one by this court in *Reboul's heirs vs. Behrens*, 5 La. Rep. 81; but a party swearing in this way should be held to state distinctly in his petition the facts which are within his knowledge and those which he has only reason to believe, otherwise the oath would be wanting in that explicitness which is necessary to subject the affidavit to the penalties of perjury, if the facts sworn to prove to be different.

EASTERN DIS.  
February, 1841.

SCHUBER  
vs.  
BOSGREAUX.

An affidavit, which declares that "the facts in the petition stated as within his knowledge are true and those not so stated he believes to be true," is sufficient to maintain an injunction; but it should be distinctly stated in the petition the facts which are within his knowledge and those which he has only reason to believe.

The plaintiff's petition is not perhaps as satisfactory in this respect as could be desired. On examining it, however, we find that the only fact not stated positively and as within plaintiff's knowledge is that relative to the transfer of the notes sued on, to the plaintiff, he alleges "that he believes and expects to prove that the transfer of the notes was made by the payee thereof to the plaintiff after they became due; or if transferred before, were so transferred without consideration, only for the purpose of collection, and in fraud of his rights as between vendor and vendee." All the other facts of the petition necessary to entitle the plaintiff to an injunction are set forth, not in a qualified manner, but positively and as within his knowledge. They are, that the lot bought by him forms a part of the property now claimed by the heirs of Poultney, and for which suit is pending in the United States Court; that he fears he will be disquieted in his title and possession to said property by the said heirs, and that at the time of purchasing he had no knowledge of any adverse claim. To his petition he annexed the proceedings in the United States Court, from which it appears that there was an intention of claiming this particular lot in as much as plaintiff's vendor and her husband, Kline, were made parties to the suit. With such a showing on record we think that the



EASTERN Dis.  
February, 1841.

MORGAN  
vs.  
DRIGGS ET AL.

affidavit should have been held sufficient. But it is said that admitting the sufficiency of the affidavit the plaintiff has failed to prove as he was bound to do, on the trial of the rule, the truth of the facts alleged in his petition; and particularly that relative to defendant's want of title to the notes sued on. To this it has been answered that the affidavit having been found insufficient, it became unnecessary to proceed to the proof of any fact set forth in it. Justice, we think, requires that the case should be remanded for further proceedings on the other grounds set forth in the rule taken on the plaintiff for the dissolution of the injunction.

It is therefore ordered that the judgment of the District Court be reversed, and the case remanded for further proceedings. The appellee paying the costs of this appeal.

### MORGAN vs. DRIGGS ET AL.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT FOR THE PARISH OF  
POINTE COUPEE, THE JUDGE OF THE SECOND DISTRICT PRESIDING.

Reconventional demands for damages for the wrongful suing out of an injunction and false imprisonment, cannot be pleaded and set up in a possessory action: they are independent and distinct from it and foreign to the cause on which it is based.

Damages for the wrongful suing out of an injunction, may be claimed in the same suit, under the provisions of the act of 1831, in cases embraced by it; but from its wording it seems to apply particularly where judgments are enjoined.

The verdict should always respond to the issues made by the pleadings, and pass on the principal action, and unless special, it ought, in cases of reconvention to pronounce upon the respective rights or actions of both parties.

This is a possessory action. The plaintiff alleges he is the

Act 1839  
p 164 § 7  
7th 5-16

6th 4688

possessor and owner of a tract of land composed of three distinct claims, viz: McLanahan, Enet, and La Rue, lying in the Parish of Pointe Coupée, and fronting on the Mississippi river; that he has had actual possession thereof for more than two years, and that the defendants, Henry Driggs, A. Buts, R. Richards, and Ward, have forcibly and tortiously and without right entered on said land and took illegal possession thereof, and committed great waste and damage, by cutting timber and destroying trees growing thereon, to his damage \$2,000. He prays for writs of injunction, arrest, &c., against said defendants, and that he have judgment decreeing him the possession thereof as owner with \$2,000 in damages, &c.

EASTERN Dist.  
February, 1841.

MORGAN  
vs.  
DRIGGS ET AL.

The defendants severed in their answers. Driggs pleaded a general denial; and denies specially that the plaintiff had any right whatever to sue out an injunction, and claims 1,000 dollars in damages for the wrongfully suing out of the same; and further answering, claims \$5,000 damages in reconvention for false imprisonment, &c. He prays that the injunction be dissolved, with damages, the suit dismissed, and that he have judgment in reconvention for all of his said damages and costs.

Ward pleaded the general issue, and averred he had been arrested and imprisoned for more than a month, also prayed judgment dismissing the suit, and in reconvention dissolving the injunction with damages, and for \$5,000 as damages for the false imprisonment.

These pleadings were the principal ones, and formed the substantial issues of the case which were submitted to the jury for trial. After the pleadings were made up the plaintiff's counsel moved the court to strike out the reconventional demand from the defendant's answer, which was refused, and a bill of exception taken. The instructions given by the Judge to the Jury were also excepted to by plaintiff.

The case then proceeded on its merits. The imprisonment

EASTERN Dis. of the defendants was fully proved. Evidence and the testimony of witnesses were offered to show the plaintiff's possession and the extent to which he claimed. Upon the whole

MORGAN  
vs.  
DRIGGS ET AL.

evidence of the case, the jury found as follows: "Verdict in favor of the defendant, H. Driggs, for false imprisonment \$1,200, and for the wrongful issuing of the injunction \$500; verdict for the defendant Ward \$500.

After an unsuccessful effort to obtain a new trial on the ground of newly discovered evidence, and that the verdict was contrary to law, from the judgment confirming it, the plaintiff appealed.

*Isley, Nicholls & Stevens*, for the plaintiff.

1. That the court below erred by not striking out the defendant's pleas in reconvention, on the ground that they *were not necessarily connected with, or incidental to the cause of action set forth in plaintiff's petition.* C. Pr. arts. 153, 154, 374, 375, 376, 377. 11 La. Rep., *Keene vs. Relf*, p. 304. 13 *idem* 66.

2. The court erred by instructing the jury that the plaintiff must have been *in the real and actual possession* of the land at the *instant* the acts complained of took place, because such instruction was contrary to law and well calculated to mislead the jury, *giving them to understand that it was indispensably necessary for the plaintiff in person or by his agent to be actually on the land at that time.* 13 La. Rep., *Ellis vs. Prevost*.

3. That the court erred by refusing to instruct the jury that if they should be of the opinion the plaintiff had not established his claim for possession, yet if he had shown a better right to the land and the damages than the defendants, he would still be entitled to a verdict for the damages. *See 6 L. R., 559, in which plaintiff recovered damages for trespasses without establishing title or possession.*

4. That the court erred by instructing the jury that in as

sessing the damages for the defendants, they *were not to be* EASTERN DIS. February, 1841.  
*confined to the pecuniary loss actually suffered* by the defen-  
 dants, for it *was impossible to prove in dollars and cents the*  
*damages* suffered. Such instruction was illegal, because it MORGAN TS. DRIGGS ET AL.  
 would, and did, cause the jury to give vindictive damages.

5. There is no direct evidence of the amount of damages suffered by the defendants for the imprisonment, the only evidence being that they were imprisoned, from which the jury inferred the amount of damages, thereby acting as witnesses without the plaintiff having an opportunity of cross examining them.

6. The damages are exorbitant and excessive. There is no evidence showing that the plaintiff acted from improper motives, but on the contrary, that he only was endeavoring to secure in the mode prescribed by law, what he verily believed to belong to him. 4 L. R. 46. 7 idem 579. 13 idem 90.

7. New evidence was discovered after the trial, and the necessary steps were duly taken to obtain a new trial, the same was therefore illegally refused, C. P. art. 560.

8. The verdict of the jury is illegal, null and void, because the demand of the plaintiff does not appear to have been acted upon by the jury, and because it does not appear whether the verdict in favor of Ward is for the imprisonment or the injunction.

*Thomas & Preston*, for the defendants.

1. The verdict of the jury is not injurious to the plaintiff, it being in accordance with the law and evidence of the case.

2. The plaintiff claims, under a sale from Joseph Enet, but an examination of the testimony will show that the defendants were not on the Enet tract, admitting it to belong to plaintiff.

3. The injunction, arrest, and sequestration, obtained by plaintiff were clearly unjust, defendants having been in peaceable possession for more than a year prior to the institution of this suit. C. P. 49.

EASTERN DIS.  
February, 1841.

MORGAN  
vs.  
DRIGGS ET AL.

4. Admitting that title can be introduced in a possessory action, the one sought to be adduced by plaintiff on the trial of this cause does not agree with the allegations contained in his petition.

5. The plea in reconvention was correctly sustained by the court *a qua*. The demand of the defendants for damages, was a consequence of the transaction of the plaintiff in this suit, and growing out of the same transaction, they have a legal right to recover. Code of Practice 375. 6 N. S. 671. 8 N. S. 149. 10 L. R. 183.

*Simon J.* delivered the opinion of the court.

This is a possessory action which presents the same features as the one decided upon by this court in the case of *Morgan vs. Driggs et al.*, reported in the 15th La. Rep., 451. Indeed it is founded on the same facts, presented on the same kind of alleged possession, and is between the same parties, except that the plaintiff thought proper to make other persons parties defendants with those whom he had previously sued in the former action. He alleges to be the owner and possessor of a tract of land which he describes, composed of the M'Lanahan, Enet and Larue claims, the boundaries of which are described in a plat of survey which he intends to produce; that the defendants have repeatedly committed divers illegal and tortious acts, on the said tract of land, to his prejudice, by cutting down and destroying the trees, etc.; from which he has sustained damages to the amount of \$2000; he prays that said defendants be arrested and held to bail; that a writ of injunction issue commanding them to desist from their said tortious and illegal acts and to quit and leave the land; that judgment be rendered in his favor for \$2000 damages; that defendants be ordered to abandon the land, that the possession thereof be restored to him, said plaintiff; and that he be put in possession of the same accordingly. A few days afterwards plaintiff filed a supplemental petition, in which he

prayed for a writ of sequestration to issue, for the purpose of sequestering the tract of land in dispute, with all its appurtenances, rents and profits, wood and timber thereon being, &c., &c.; which order was granted. The three several writs of injunction, arrest and sequestration were regularly issued and duly executed; the defendant, Driggs, after having been imprisoned for a few days under the writ of arrest, furnished his bail; and the defendant, Ward, after having also been imprisoned for a longer time, was released. The two other defendants not having been found, no citation was served upon them.

The defendants, Driggs and Ward, severed in their defence; pleaded the general issue, and respectively reconvened the plaintiff's demand by a claim for damages to the amount of \$1000 as resulting from the wrongful suing out of the injunction, and to the amount of \$5000 from the imprisonment to which they had been subjected under the writ of arrest, alleged to have been illegally issued. The jury found a verdict in favor of Driggs for false imprisonment, twelve hundred dollars; for the wrongful suing out of the injunction, five hundred dollars; and in favor of Ward generally for five hundred dollars; and after an unsuccessful attempt to obtain a new trial, the plaintiff appealed.

The first question which we are called upon to notice, arises out of a bill of exceptions taken to the opinion of the court overruling the motion made by plaintiff's counsel to strike out the defendants' pleas in reconvention, on the ground that they are not so connected with the cause of action set forth in plaintiff's petition as to be made the grounds of reconventional demands. We think the District Judge erred: the claims set up in reconvention by the defendants cannot be said to be necessarily connected with and incidental to the cause of action set forth in plaintiff's petition; they do not grow out of the transactions which afford the grounds and basis of the action, but are merely the consequences of the proceedings which he

EASTERN DIST.  
February, 1841.

MORGAN  
VS.  
DRIGGS ET AL.

Reconventional demands for damages for the wrongful suing out of an injunction and false imprisonment, cannot be pleaded and set up in a possessory action: they are independent and distinct from it and foreign to the cause on which it is based.



**EASTERN DIS.** resorted to to enforce his legal rights, and result from the con-  
February, 1841. servatory measures which he thought proper and necessary to

**MORGAN**  
**vs.**  
**DRIGGS ET AL.** take to secure the exercise of his said rights. They are, in  
 their nature, independent and distinct from the possessory ac-  
 tion brought by the plaintiff, and are entirely foreign to the  
 cause on which it is based.—*C. of Pr., arts. 374, 375, 376 and*  
*377.—6 N. S., 671—7 N. S., 517—10 La. Rep., 183.*

In the case of *Abat vs. Holmes*, 8 *Martin, N. S.*, 145, the defendant was permitted to reconvene the plaintiff in damages for a wrongful imprisonment, because as the action was for a forced surrender in consequence of the imprisonment, there was such a close connection between their demands that they could both be considered as springing from the same cause.

In the case of *Keene vs. Relf*, 11 *La. Rep.*, 309, in which the reconventional plea was for abusive words or slanderous epithets uttered in setting out the cause of action, this court would have felt no hesitation in rejecting said plea, had not the plaintiff joined issue with the defendant, on the matters alleged in the reconvention; but in the mean time the court said: "that the damages claimed by one party were distinct and unconnected with the damages claimed by the other"; which is exactly the situation of the claims for damages set up in this suit by the parties against each other.

In the case of *Kemp vs. Amacker*, 13 *La. Rep.*, 65, this court decided that an action of slander for damages could not be reconvened for slanderous words alleged to have been uttered by the plaintiff against the defendant, as the reconventional demand was not necessarily connected with and incidental to the principal one. So it is in the present case, and we do not hesitate to say that the reconventional demands set up by defendants against the plaintiff's action, were improperly maintained, and that they ought to have been stricken out of their answers. The defendants are therefore left to their remedy by a principal action.

We must not, however, be understood as deciding this ques-

tion, with regard to the damages claimed for the wrongful suing out of the injunction, in derogation of the law of 1831, which allows to a defendant in injunction, the right of claiming *in the same suit* ten per cent. interest and twenty per cent. damages on the amount of the judgment enjoined; and more if he can prove them: this law provides for a different class of injunctions, and, from its wording, seems to apply particularly to cases in which judgments are enjoined. In this case there would be no criterion upon which interest and damages could be claimed or allowed under the law of 1831, and the defendants' demand being merely one set up in reconvention, does not come within the provisions of said law.

EASTERN DIS.  
February, 1841.

MORGAN  
VS.

BRIGGS ET AL.

Damages for the wrongful suing out of an injunction, may be claimed in the same suit, under the provisions of the act of 1831, in cases embraced by it; but from its wording it seems to apply particularly where judgments are enjoined.

Having thus disposed of the point arising from the reconventional demands set up by defendants, the case is now reduced to the merits of the possessory action; and this renders it unnecessary to examine the various questions raised by the parties in relation to the charge of the court to the jury on the proper rule to fix the *quantum* of damages to be allowed; to the sufficiency of the evidence in support of the same; to the excessiveness complained of; and to the new trial applied for on the ground of newly discovered evidence; but we cannot forbear noticing the course which was pursued by the jury in finding their verdict, and by the lower court in rendering judgment thereon. The plaintiff's action appears to have been entirely disregarded both by the jury and by the court, and was not in any manner acted upon by either, in the verdict or in the judgment. This is clearly illegal and irregular, as the jury could not render a verdict in favor of the defendants on their reconventional plea, before having disposed of the principal action for or against the plaintiff, unless they thought proper to give a special verdict, which was not the case here; *C. of Pr. art. 519, 520, 521, 522 and following*; and had we not come to the conclusion that the defendants claims for damages could not be pleaded in this suit as reconventional demands, which opinion puts an end to this part of the case, this irregularity in the

EASTERN DIS. proceedings would have been sufficient in itself, however well  
 February, 1841. founded the verdict of the jury might have been on the de-

MORGAN  
 VS.  
 DRIGGS ET AL.

defendants pretensions, to remand the cause for a new trial.

The verdict  
 should always  
 respond to the  
 issues made by  
 the pleadings,  
 and pass on the  
 principal action,  
 and unless spe-  
 cial, it ought, in  
 cases of recon-  
 vention to pro-  
 nounce upon the  
 respective rights  
 or actions of  
 both parties.

The verdict of a jury should always respond to the issues made by the pleadings, and unless special, it should always, in cases of reconvention, pronounce upon the respective rights or actions of both parties.

On the merits, we do not think that justice requires this case should be remanded for a new trial. Although from the prayer for damages contained in plaintiff's petition, it appears to be in the nature of an action for trespass, it is virtually a possessory action, which, as we have already said, presents exactly the same cause of action as reported in 15th La. Rep., 471, and is between the same parties. The former suit was instituted on the 19th of October, 1837, and the present one was brought on the 12th of March, 1838, and far from the plaintiff's having shown himself to be in a better condition now, in relation to his alleged right of possession, and from having proved his said possession to be of the nature required by the article 49 of the Code of Practice, defendants had acquired a still further adverse possession which must necessarily strengthen their defence. The evidence, which is mostly the same taken from the former case, does not show any thing more definite; the plat of survey found in the record is rather unsatisfactory, the Larue claim is clearly shown to be below the Enet tract; and a witness states explicitly that the defendants are not on the M'Lanahan claim; it is also to be remarked that the location of the part of the Enet claim under which the *locus in quo* is pretended to be covered, is left as doubtful as it was on the last trial, and is not shown to extend to the defendant's premises, and there is no proof that the plaintiff ever was in possession of the two other claims, which no legal evidence has been adduced to show the extent and limits of to interfere with the defendant's possession. 15 La. Rep. 556.

On the whole, we cannot perceive any material difference between the facts of possession proven in this cause, and those shown on the former occasion; and as the plaintiff, having had repeated opportunities of establishing his demand, appears to have exhausted to no purpose all the legal means which he had of proving the allegations set forth in his two different possessory actions; an end must be brought to this litigation; and there is, in our opinion, no necessity for sending the case back for a new trial.

EASTERN DIS.  
February, 1841.

SEWALL  
VS.  
MCNEILL ET AL

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; that the reconventional pleas filed by defendants be set aside, reserving to the said defendants the right of instituting a principal action, and that the plaintiff's petition be dismissed, the costs of the lower court being paid by the plaintiff and appellant, and those in this court to be borne by the defendants and appellees.



### SEWALL vs. MCNEILL ET AL.

#### APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A seizing creditor can call for the production and inspection of notes or bills given in pledge, notwithstanding the answers of the pledgee that he has them in pledge. The creditor had a right by inspection to ascertain whether the pledge was complete by the endorsement of the pledgor.

The pledge of a bill of exchange or promissory note by notarial act, although endorsed by the payee in blank, is not complete and binding as against third persons and creditors without the endorsement of the pledgor, if the instrument be negotiable.

**EASTERN DIS.** Payment made to the payee by the drawee, of a bill of exchange which is pledged to him, evidenced by a receipt written over the payee's endorsement, before the bill was due, when it is shown the property of the bill was in another and liable to his creditors, is bad and will not avail, against the claims of creditors of the owner.

**February, 1841.**

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**SEWALL**  
**vs.**  
**McNEILL ET AL.**

The plaintiff obtained a judgment for \$1,248, against Angus McNeill who had been bailed by James Erwin.

Execution issued on this judgment and property of the defendant seized in the hands of Erwin. The plaintiff then presented his petition and propounded interrogatories to Erwin requiring him to state explicitly what property assets, rights or credits he had in his possession belonging to the defendant; and that he have judgment decreeing Erwin to pay over to him the amount of his judgment against McNeill.

The interrogatories and answers are fully set out in the opinion of the court.

When the answer was filed, the plaintiff took a rule on Erwin as garnishee to show cause why he should not deliver up to the sheriff the bills of exchange, notes and evidences of debt, admitted by him to be in his hands belonging to the defendant, and pledged by said defendant to him as an indemnity against loss by reason of his securityship as defendant's bail, to be disposed of in satisfaction of his judgment. On hearing this rule, the court considering the answers of Erwin to the interrogatories as evidence of funds in his hands, gave judgment for the amount claimed. Erwin appealed.

*Vason*, for the plaintiff, urged the affirmance of the judgment.

*Peyton & Rozier*, for the appellant.

1. It appears from the answers of the garnishee that he had no property or effects in his hands, except such as was pledged to him, in the manner fully explained in the answer to the interrogatories propounded by plaintiff and appellee. The garnishee furthermore, answers that the property pledged

will not be sufficient, in his opinion, to cover his future contingent and actual liabilities of the pledgor.

EASTERN DIS.  
February, 1841.

2. That previous to the service of the garnishee process on him, the said defendant in the court below had assigned to a person by the name of Hughes, all the residue of the property in his hands, after the said garnishee had fully paid and indemnified himself, for all his liabilities. La. Code, article 2613.

SEWALL  
VS.

M'NEILL ET AL.

3. The court *a quo*, could not order the production of any documents or papers in the possession of the garnishee, as the correctness of the answers were not disputed.

4. The court erred in rendering judgment against garnishee, as he had no property in his hands, which could be attached or seized in the suit; nor was he in any manner indebted to the defendant.

5. The answers of the garnishee are to be taken as true, as their correctness is not denied, nor any notice given that an attempt would be made to disprove them. 1 La. Rep. 229.

*Bullard J.* delivered the opinion of the court.

The plaintiff's having recovered a judgment against Angus M'Neill in a case in which James Erwin became bail for the defendant, took out an execution, and with a view of levying it upon effects or credits of their debtor in the hands of Erwin, under the act of 1839, propounded to him the following interrogatories:

1st. Have you any property or effects of any kind in your possession or under your control belonging to Angus M'Neill? or are you indebted to the said M'Neill in any amount? If yea, state the nature, value and amount of such property, effects, or such indebtedness, when due, &c., and whether sufficient to pay and satisfy the amount of the judgment rendered in favor of the plaintiff against defendant.

2d. Did not defendant place in your hands or under your



EASTERN DIS. control money, rights, credits, or effects at the time you  
February, 1841. became his bail in this suit, and have you not agreed to pay the

SEWALL  
VS.  
M'NEILL ET AL

amount of this judgment out of certain drafts, bills of exchange or other evidences of indebtedness belonging to or due said M'Neill by you, and which he has delivered up to you or placed under your control.

To the first interrogatory Erwin answered substantially that he had none, and was not indebted in any manner except as therein explained. That on the 26th of March, 1840, before Christy, Notary, the said Angus M'Neill, in consideration of an advance made to him of about eight hundred dollars and further advances to be made; and further that he (Erwin) had become his bail in three several cases, to the amount of about four thousand dollars, and in order to secure the respondent against any loss or damage he might suffer from being security, pledged and delivered to him a bill of exchange for \$3303 28, drawn by Joseph Henry on him, the said Erwin, to the order of and endorsed by the said M'Neill, dated March 10th, 1840, and made payable ninety days after date; and also three promissory notes for \$2083 $\frac{1}{2}$  each, to the order of and endorsed by the said M'Neill, dated March 23d, 1840, and made payable in one, two and three years after date, and secured by mortgage. That M'Neill agreed in said act that the respondent should have the right to reimburse himself at any time all advances made by him, by disposing of the said bill and notes, and that respondent's suretyship on said bail bonds is still in full force. He further answers that previously to the serving of the attachment the said M'Neill had assigned to J. J. Hughes, of Mississippi, any assets which might remain in his hands, of which he had due notice. He further answers that he is largely in advance for M'Neill, and he does not believe the assets in his hands will suffice to cover his advances and liabilities.

The second is answered in the negative except as above set forth, and that he never assumed to pay the judgment in this case.

The seizing creditors obtained from the court an order for the production of the original notes and bills of exchange notwithstanding the objection of the respondent, and a bill of exceptions was taken. The court, in our opinion, did not err ;

*EASTERN Dis.  
February, 1841.*

SEWALL  
VS.

M'NEILL ET AL.

although the answers to interrogatories had not been contradicted. The creditor had a right by inspection to ascertain whether the pledge was complete by the endorsement of the pledgor with a view of controverting the answers and showing that the notes or bill of exchange was yet as to creditors the property of M'Neill and liable to seizure.

Seizing creditor can call for the production and inspection of notes or bills given in pledge, notwithstanding the answers of the pledgee that he has them in pledge. The creditor had a right by inspection to ascertain whether the pledge was complete by the endorsement of the pledgor.

Upon the production of the originals it appears that the bill of exchange described in the act of pledge and in the answers of interrogatories was drawn by Henry in favor of H. C. M'Neill, and not of Angus M'Neill, and that it does not bear the signature of the latter.

The question, therefore, which the case presents is whether the pledge was complete as to the creditors of M'Neill without his endorsement upon the bill of exchange, although in effect payable to bearer at the time of the pledge, in consequence of the blank endorsement of the original payee, H. C. M'Neill.

Art. 3123 of the Code provides that when a debtor wishes to pawn a claim on another person, he must make a transfer of it in the act of pledge, and deliver to the creditors to whom it is transferred the note or obligation, which proves its existence, if it be under private signature, and *must endorse it if it be negotiable.*

It has been contended that the endorsement of Angus M'Neill was useless, in as much as the bill of exchange was already endorsed by the payee in blank, and would therefore pass by delivery. In the ordinary course of business, there is no doubt such would be the case, but we think the articles of the Code which relate to the contract of pledge, by which a debtor seeks to secure a debt, perhaps to the prejudice of other creditors, ought to receive a strict construction. The bill of exchange, although it might pass by delivery, was still ne-

The pledge of a bill of exchange or promissory note by notarial act, although endorsed by the payee in blank, is not complete and binding as against third persons and creditors without the endorsement of the pledgor, if the instrument be negotiable.

EASTERN DIS. gotiable, and the article in question requires an endorsement. February, 1841.

SEWALL  
VS.  
M'NEILL ET AL.

Two subsequent articles, to wit: 3127 and 3128, appear to us to fortify this construction of that under consideration. They provide first, that when the thing given in pledge consists of a credit *not negotiable*, to enable the creditor to enjoy the right of pledge as to other creditors, not only an authentic act or an act under private signature, duly recorded, is required, but it is necessary that *a copy of the act shall be served on the debtor* of the credit given in pledge; but secondly, on the other hand, this notification to the debtor is not required if the debt be evidenced by a note or other obligation payable to *bearer or order*, because in that case it will suffice that the note or obligation shall have been endorsed by the person pledging it. This last article clearly denies to the pledgor the right of causing his debt to be paid by preference over other creditors out of the thing pledged, in the case of a note payable to bearer, without the endorsement of the pledgor, and such endorsement accompanying the act of pledge, stands in lieu of notice to the debtor of the obligation pledged, which alone can conclude other creditors of the pledgor.

The bill of exchange in question does not bear the endorsement of Angus M'Neil, although admitted by the act of pledge to be his property, and consequently the pledge is imperfect in relation to judgment creditors of the pledgor.

Payment made to the payee, by the drawee of a bill of exchange which is pledged to him, evidenced by a receipt written over the payee's endorsement, before the bill was due, when it is shown the property of the bill was in an other and liable to his creditors, is bad and will not avail, against the claims of creditors of the owner.

The notice given by M'Neill to Erwin to hold subject to the order of J. J. Hughes any money or effects he might have in his hands, after meeting any engagements he may have come under for him (M'Neill), together with certain cotton in his gin, cannot affect this case. Nothing shows that Hughes has any knowledge of such a transfer. The only advance specifically sworn to is \$800—the rest is in too vague terms to avail the appellant.

Upon the production of the original, it appears that the bill of exchange is marked paid and a receipt for the amount, at a time when it was not due, written over the signature of H. C.

M'Neill. The bill was admitted by the parties to be the property of Angus M'Neill, and a payment to H. C. M'Neill is not a valid payment. It is a misfortune if the appellant has incautiously paid to a person not entitled to receive the amount, but for the purposes of this suit and in relation to the plaintiff, we must consider the money still in his hands and belonging to M'Neill, except the sum of \$800.

The appellee has not asked for any modification of the judgment in his favor.

The judgment of the District Court is therefore affirmed with costs.

EASTERN DIS.  
February, 1841.  
HARDY  
VS.  
LANDRY'S HEIRS

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**HARDY, Superior of the Convent of the *Sacré Cœur*, vs.**

**LANDRY'S HEIRS.**

APPEAL FROM THE COURT OF THE SECOND DISTRICT FOR THE PARISH OF

ST. JAMES, THE JUDGE OF THE DISTRICT PRESIDING.

A tutrix may appoint an attorney in fact to carry into effect any act of sale which she could legally execute.

Security against the danger of eviction will be required when the title is not complete, although the lapse of time renders the probability of a disturbance somewhat remote.

When security is given against a disturbance or eviction the vendor may proceed with his executory process for the *price* due on the sale.

This is an injunction case to stay executory proceedings.

The plaintiff, in her capacity as "Superior of the Convent of the *Sacré Cœur*," in the parish of St. James, purchased a tract of land at the Probate sale of Joseph Landry's estate partly for cash, and the balance on a credit for which notes were given. When they became due, payment was refused on the ground of a defect in the title.

**EASTERN DIS.** The heirs of Landry took out an order of seizure and sale  
**February, 1841.** on the vendor's mortgage and privilege against the property,  
**HARDY** when the plaintiff obtained an injunction, setting up various  
**VS.** defects in the title under which the property in question was  
**LANDRY'S HEIRS** held.

The facts and material circumstances of the case are sufficiently set forth and stated in the opinion of the court.

The District Judge on hearing this case overruled all the objections set up to the title, and dissolved the injunction with ten per cent. damages on the sum enjoined, and allowed the seizure to proceed. The plaintiff in injunction appealed.

*Winchester & Hoa*, for the appellant.

*M<sup>r</sup> Kinney*, contra.

*Garland, J.* delivered the opinion of the court.

At the probate sale of the succession of Joseph Landry, the plaintiff became the purchaser for the use of the Convent, of a tract of land having seven arpents front on the Mississippi River, by the depth of forty arpents, situated in the Parish of St. James, for the sum of \$14,000; a portion of which was paid in cash, and two notes executed for the balance, one of which, the plaintiff refusing to pay, an order of seizure and sale was taken out by the defendants, and she enjoined the proceeding, alleging defects in the title to the property, apprehensions of disturbance and requiring as a preliminary to payment of the price, that security be given to indemnify the parties interested in case of eviction. As to the objection, that the sale is imperfect and insufficient, because not signed by the tutrix of the minor children of Joseph Landry, but by one of the major heirs as attorney in fact for

A tutrix may appoint an attorney in fact to carry into effect any act of sale which she could legally execute. Besides, the act of sale was entirely unnecessary, as the

adjudication of the property by the Probate Judge, signed by EASTERN DIS. February, 1841. him and the parties was sufficient to transfer the title. The act passed before the notary was unnecessary. La. Code, art. 2601.—9 La. Rep. 180. There is no other objection to the title for five arpents front of the land, and so far as it respects that, the injunction must be dissolved and the plaintiff required to pay without any security being given.

The title to the remaining two arpents was derived from the succession of one Marin Labauve, and as it appears those two arpents front formed part of a larger tract sold to Joseph Landry and his brother Pierre, in 1797, and as it does not appear there ever was a partition between them or their heirs, it may be a sufficient reason to apprehend a disturbance and authorise the requirement of security. The legal title to an undivided half of the land was originally in Pierre Landry as is acknowledged by the ancestor of the defendants, and as they show no partition, and minors appear to be interested, we think they ought to be given to secure the plaintiff against the danger of eviction. La. Code, art. 2535. The length of time that has elapsed renders the probability of a disturbance somewhat uncertain, but we are not prepared to say that an action of partition would be prescribed.

The judgment of the District Court is therefore annulled and reversed, and proceeding to give such judgment as in our opinion ought to have been rendered in the court below, we order, adjudge and decree, that the injunction granted in this case be maintained until the defendants in the injunction, give bond and security to the satisfaction of the court, in the sum of three thousand dollars, conditioned to secure the plaintiff in the title to the two arpents front of land, by forty in depth acquired from the succession of Marin Labauve, deceased, and indemnify them against eviction, upon the giving of which bond, the defendants are permitted to proceed upon their order of seizure and sale for the sum claimed, subject to a deduction of the sum of two thousand dollars paid on the

Security against the danger of eviction will be required when the title is not complete, although the lapse of time renders the probability of a disturbance somewhat remote.

When security is given against a disturbance or eviction the vendor may proceed with his executory process for the price due on the sale.



**EASTERN Dis.** 4th April, 1840, to Hildebert Landry, as appears by his note  
**February, 1841.** in the record, the interest to be calculated accordingly; the  
 costs of the injunction in the court below and of this appeal to  
 be paid by the defendants and appellees.

**LESASSIER**  
**vs.**  
**DASHIELL.**

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**LESASSIER vs. DASHIELL.**

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, FOR THE PARISH  
 OF IBERVILLE, THE JUDGE THEREOF PRESIDING.

Where the minor's rights against his tutor are secured by a special mortgage *regularly accepted*, by a family meeting and *by the court*, the purchaser is justified in concluding that the general mortgage in favor of the minor has ceased to exist.

Third persons dealing with a tutor are bound to enquire how the minor's rights are secured; and the general mortgage resulting from the tutorship only ceases to exist with regard to third persons after the special mortgage has been *accepted and recorded*.

The general rule is, that purchasers under the faith of proceedings *apparently sanctioned* by the Probate Court, or a judgment cannot be affected by a suit of the minor seeking to annul those proceedings.

So judicial mortgages resulting from recorded judgments of creditors of a tutor, acquired under the faith and protection of a decree of a court of competent jurisdiction, which had never been annulled or attacked, will be satisfied in preference to the minor's general mortgage purporting to have been raised by this judgment.

But where the proceedings in the court of Probates do not conform to all the provisions and formalities of the law required in giving special, in lieu of a general mortgage, the judgment rendered therein is not sufficient to protect purchasers against the minor's general mortgage.

And where no experts were appointed, no previous liquidation of the minor's rights had and the act of special mortgage not accepted by the Judge or under tutor, and never sanctioned by the court of probates, such proceedings will not authorize the purchaser from the tutor to disregard the minor's general mortgage.

A judgment not attacked as fraudulent or collusive is *prima facie* evidence that the sum for which it is rendered, is justly due the minor.

This is an hypothecary action by Luke Lesassier against mortgaged property in the possession of the defendant.

EASTERN DIS.  
February, 1841.

LESASSIER  
VS.  
DASHIELL.

The plaintiff shows that he obtained a judgment in 1838, against his tutor Timoleon Lesassier, for upwards of \$17,000, with right of mortgage resulting from the tutorship on all the property of the said T. Lesassier, held and owned by him since the 24th May, 1829, the date of his tutorship. He further shows that upwards of \$3,000 have been paid on said judgment, leaving still a balance of \$14,151 due and unpaid. That the defendant purchased and is in possession of a plantation and slaves subject to this legal mortgage which he purchased in March, 1836. He therefore prays that an order of seizure and sale issue in virtue of his said legal mortgage, against said property in the possession of the defendant, and that so much thereof may be seized and sold as will satisfy and pay the balance due on his judgment against his tutor T. Lessassier.

The plaintiff gave the usual notice of having in vain demanded the amount of his debt from L. Lesassier more than 30 days, and that the defendant must pay the same within ten days or give up the mortgaged property to be sold.

That defendant pleaded the general issue; and that the general mortgage of the plaintiff had been extinguished by a transaction and novation by the proceedings of a family meeting held on the 14th February, 1835, called to deliberate on the affairs of the said Luke Lesassier then a minor, which proceedings were duly homologated, and a new or special mortgage given in lieu of the general mortgage existing on the property of T. Lesassier; and that the property seized was released from all mortgage in favor of the plaintiff. That the judgment set up as the basis of the plaintiff's claim is irregular, illegal and null, having been obtained *ex parte* and can have no effect in law. He therefore prays for an injunction restraining and enjoining the seizure of his property, and which he prays may be made perpetual.

EASTERN DIS.  
February, 1841.

LESSASSIER  
vs.  
DASHIELL.

Upon these pleadings and issues the cause was tried.

The judgment of the Probate Court of the parish of Iber-ville, homologating the proceedings of the family meeting, accepting a special, in lieu of the general mortgage existing on all the property of T. Lessassier, resulting from his tutorship was produced in evidence. The act of special mortgage had been drawn up and signed by the tutor but not accepted by the Judge or under tutor. Other irregularities in the proceedings were proved and pointed out.

The plaintiff offered in evidence the judgment he had obtained against his tutor in liquidation of his demand.

There was judgment setting aside the order of seizure and sale, and ordering the property to be delivered up to the defendant.

The plaintiff appealed.

*Labauve*, for the plaintiff and appellant, contended, that it was incumbent on the defendant, who averred that the proceedings in the Probate Court were regular and destroyed the plaintiff's general mortgage, to have shown that they were regular. It was not the plaintiff's duty, he could not be required to prove a negative, and until these proceedings were shown to be regular and legal the plaintiff's general mortgage still existed. The proceedings and judgment of the Probate Court taking a special mortgage must be in due form of law or it is null.

2. The case of *Casanova's heirs vs. Avegno* (9 La. Rep. 192) relied on in the defence, was decided under a former law and does not apply. The mortgage in question there was given in 1827, and was accepted in the manner and form as prescribed by the *La. Code art. 3308*.

3. The present case is to be decided under the act of 1830. The formalities required are specified. The 8th section provides for appraisalment by experts, of the property offered for the special mortgage;—the liquidation and ascertainment of the rights and the sum due the minor; and that the Judge

shall in no case accept the special mortgage unless it exceeds EASTERN DIS. February, 1841. the sum due the minor by at least 25 per cent., &c. None of these formalities have been complied with; and the Judge, LESASSIER vs. DASHIELL nor the under tutor, ever *accepted* the special mortgage as is expressly required by law. See session acts of March, 1830, sec. 8, page 48.

*Ives & Winchester*, for the defendant, made the following points:

1. Act of 1830 was intended to apply to surviving father or mother as natural tutor or tutrix. The 8th section, it is true, speaks of tutors and curators, but does not require the parish judge to join in the act of special mortgage and *accept* the same, but that "*on receiving*" it he must be satisfied by estimation of experts of the value of the property, &c., and if of insufficient value, perhaps he may reject it; but he never did this, whether through ignorance or negligence, or on *his own responsibility* it is not for us to say.

2. The proper question is, was the special mortgage complete so as to *bind* the tutor; if so, and there can be no doubt of it, the other party is not to loose from it—both parties are bound, or neither is bound.

If the mortgage was voidable, it was not void, and to make it void the judge should have notified the tutor, T. Lesassier, to furnish a new mortgage, even to affect the tutor himself. But the defendant, Dashiell, after his purchase, on the tacit acceptance of the parish judge, who recorded the special mortgage if he did not *receive* it, cannot be affected in his property by any other subsequent proceedings. The mortgage was given on the property, offered to the family meeting and *approved or accepted by the judgment of homologation* and the real situation of the property was exhibited to the family meeting, to the under tutor, and the judge, by the certificate of mortgages furnished by the judge himself.

3. This court has decided, 14 La. Rep., 469, that this tacit

EASTERN Dis. mortgage has been released and that Dashiell cannot be affected by it, and the same decision *condemns Dashiell to pay the*  
February, 1841.

LESASSIER  
 VS.  
 DASHIELL.

*purchase money*, and he, having been thus *stripped* of the tacit mortgage "as a shield," it cannot now be raised against him "as a spear." The decision of the Probate Court annulling the judgment of homologation of the proceedings of the family meetings does not affect Dashiell nor the property in his hands as *third possessor*, 15 *idem*, 58.

4. In a question of *equity*, if *the legal* rights of an innocent purchaser, a third party, be still doubtful, the defendant is entitled to the most favorable consideration—the decisions of this court against him have held him to pay the whole *amount of the purchase money* (*per avertionem*) although he only acquired two-thirds the quantity of land expressed in the act of sale. He *raised this very tacit mortgage in defence*, but it was beaten down. The plaintiff was a man of business at the time of raising the tacit mortgage—he could have attached the purchase money in Dashiell's hands before the transfer by his tutor to Maurin & Co.—he has also a remedy against the securities of his tutor, and against his under tutor; and it is a pity that he has it not against the parish judge.

*Simon, J.* delivered the opinion of the court.

On the issuing of an order of seizure and sale at the suit of the plaintiff against the defendant, Dashiell, as third possessor of certain real property and slaves formerly owned and possessed by Timoleon Lesassier, his, said plaintiff's, former tutor, to satisfy a sum of \$14,151, with interest; and to secure which, he alleged in his petition, to have a tacit and general mortgage on all the property of his said tutor; said defendant made opposition to the said order of seizure and sale, and obtained and sued out a writ of injunction on the grounds: 1st. That the alleged mortgage had been extinguished by transaction and novation, by the proceedings of a family meeting regularly held on an order of, and duly homologated by,

the Court of Probates of the parish of Iberville; by virtue of which a new and special mortgage was made in favor of the plaintiff, then a minor; and by which the alleged legal mortgage on the property seized was extinguished and raised. 2d. That the judgment liquidating the rights of the plaintiff, is irregular, illegal, null and void, having been obtained *ex parte* and without sufficient and legal evidence.

EASTERN DIS.  
February, 1841.  
LESASSIER  
VS.  
DASHIELL.

On this opposition and injunction, plaintiff joined issue and averred that the general and tacit mortgage which he had on the property of his former tutor, had never been cancelled, changed or novated in the manner and form prescribed by law; that the same is and has always been in full force on the property seized; that the pretended special mortgage is illegal and null, as the formalities and requisites of the law had never been complied with; and that the proceedings had in relation thereto are also null and void, for the following reasons:

1. Because the property specially mortgaged was not appraised by experts, as prescribed by law.

2. Because had said property been appraised, the same would have proved insufficient to secure the minor's rights.

3. Because no liquidation of his said rights had been previously made, so as to ascertain the amount intended to be secured by the special mortgage.

And 4. Because said special mortgage having not been passed and executed in the manner and form prescribed by law, the same is not binding on the minor.

On these issues, the cause was tried, and the District Judge being of opinion that the general and tacit mortgage resulting from the tutorship, had been legally and regularly released, ordered the order of seizure and sale to be set aside, and the property seized to be restored to the defendant. From this judgment the plaintiff appealed.

The evidence shows that plaintiff was born on the 18th of July, 1817; that Timoleon Lesassier was duly appointed his tutor and qualified as such in February, 1829; that on the 4th



EASTERN DIS. of February, 1835, said tutor made application to the Court  
February, 1841. of Probates for an order to convene a meeting of the minor's

LESASSIER  
vs.  
DASHIELL.

family, for the purpose of deliberating and giving their advice on the propriety of permitting him to execute an act of special mortgage on certain real property, in lieu of the general one; and of releasing the said general mortgage; which order was granted. That on the 14th of February, the family meeting was holden before a notary public, in the presence of the under tutor of the minor; that they found the property proposed to be mortgaged, to be fully sufficient to secure the rights of the minor, and that they accordingly advised that on the tutor's executing a special mortgage on the property offered, in favor of the parish Judge of the parish of Iberville *for the benefit of the minor*, according to law, all the other property of said tutor should be declared free from all mortgages or incumbrances whatsoever in favor of said minor; all which was approved by the under tutor. On the 17th of February, a petition was presented by the tutor to the Court of Probates, praying for the homologation of the said deliberation; on the 18th, a decree was rendered by said court, ordering: *that the deliberation of said family meeting be homologated, and that on the said Timoleon Lesassier's specially mortgaging the property in these proceedings described and designated, then his other property be discharged and liberated from all mortgages in favor of the said Luke Lesassier, affecting the property of said Timoleon Lesassier in consequence of his tutorship*; and on the 21st of the same month, an act of special mortgage was executed before a notary public, in favor of the parish judge of the parish of Iberville, *for the use and benefit of the minor*, which act does not appear ever to have been accepted by the said parish judge, or by the under tutor. On the 8th of March, 1836, defendant purchased the property from Timoleon Lesassier.

It is contended on the part of the appellee that the special mortgage was complete and sufficient to bind the tutor; that in

giving the same, the formalities of the law were fully complied with; that the law under which the proceedings were had, does not require the parish judge to join in the act of special mortgage and accept the same; that the appointment of experts under the law of 1830 is only required to satisfy the parish judge on the sufficiency of the property, and to enable him to reject the special mortgage, if insufficient; that having not done so, the property must be presumed to be sufficient; that the real situation of the property was exhibited to the family meeting, the under tutor, and the judge by the certificate of mortgage furnished by the judge himself; that the whole was approved and accepted by the judgment of homologation; and that it was not the purchaser's duty to look beyond the said judgment of homologation. He relies mainly on the case of Casanova's heirs *vs.* Avegno, 9 *La. Rep.*, 194, and on the case of Lesassier *vs.* Dashiell, 14 *idem*, 467.

If, on the one hand, according to the doctrine repeatedly sanctioned by this court, it be true that whenever a person desirous of purchasing property from a tutor, after inquiring how the minor's rights are secured, finds that such rights are secured by a special mortgage, *regularly accepted by a family meeting and by the court*, he is justified in concluding that the general mortgage in favor of the minor had ceased to exist; on the other hand, it is equally true that the law regards the interests of minors with a paternal solicitude, and that its provisions for their protection ought to be strictly enforced.

In the case of Casanova's heirs *vs.* Avegno, relied on by defendant's counsel, this court said that a third person dealing with the tutor in relation to his property, is *bound to enquire* how the rights of the minor are secured, and that the general mortgage resulting from the tutorship ceases to exist with regard to such third person, after the special mortgage has been once *accepted and recorded*. The proceedings, then under consideration, had taken place previous to the law of 1830, and the court found that the forms required by law for the

EASTERN DIS.  
February, 1841.

LESASSIER  
VS.  
DASHIELL.

Where the minor's rights against his tutor are secured by a special mortgage regularly accepted, by a family meeting and by the court, the purchaser is justified in concluding that the general mortgage in favor of the minor has ceased to exist.

Third persons dealing with a tutor are bound to enquire how the minor's rights are secured; & the general mortgage resulting from the tutorship only ceases to exist with regard to third persons after the special mortgage has been accepted and recorded.

EASTERN DIS. validity of such proceedings, appeared to have been ob-  
February, 1841. served.

LESASSIER  
 vs.  
 DASHIELL.

In the case of *Lesassier vs. Dashiell*, which was an action for the payment of a part of the price of the property sold by Timoleon Lesassier to the present defendant, said defendant objected to the said payment, among other grounds of defence: because there existed on the property a tacit mortgage in favor of the present plaintiff. This was a general allegation, made without specifying the particular reasons why the tacit mortgage still existed; the judgment homologating the deliberation of the family meeting and the act of special mortgage were produced; and for aught we know, far from there having been any attempt made to support the alleged defence, it appears to have been taken for granted that the proceedings were regular. No further enquiry seems to have been made into the real nature, extent and effect of the said judgment of homologation, particularly perhaps as the person really interested was not a party to the suit, and this court decided the case on the general doctrine that the defendant, who had purchased under the faith of proceedings *apparently sanctioned* by

The general rule is, that purchasers under the faith of proceedings *apparently sanctioned* by the probate court or a judgment cannot be affected by a suit of the minor seeking to annul those proceedings. the Probate Court, could not be affected by the result of a suit by which the minor should seek to annul those proceedings. Had the question been presented in its true light, and the enquiry made into the validity or rather sufficiency of the proceedings, we are not ready to say that the defendant on showing the danger of eviction from the existence of the minor's general mortgage, would not have been entitled to demand security from his vendor, before being compelled to pay the amount of the instalment sued for.

The case of *Leblanc vs. his creditors* (16 *La. Rep.*, 120) lately decided in the Western District, is another instance in which this court had again occasion to make a proper application of the general principle, recognized in the case of *Casanova vs. Avegno*, protective of the rights of third persons who deal with a tutor after a special mortgage has been given; but

in that case, which presented the question whether subsequent mortgage creditors of the insolvent tutor, should be paid in preference to the minor, whose general mortgage was alleged to have been illegally and improperly released by a definitive judgment of the Court of Probates; the proceedings had been made in conformity with the eighth section of the act of 1830, experts had been appointed by the judge, the proceedings were all regularly carried on, and were completed by the rendition of a judgment by which the special mortgage was accepted; and the general one ordered to be absolutely and *unconditionally* released; this court said in substance that the judicial mortgages having been acquired by third persons under the faith and protection of a decree of a court of competent jurisdiction, which had never been annulled or in any manner attacked, should be satisfied in preference to the minor's pretended general mortgage. This doctrine is certainly correct and incontrovertible, and the question in this case is whether it can be applied to the pretensions of the defendant, that is to say, whether there be such final judgment of the Probate Court accepting the special mortgage given by Timoleon Lessassier, as to be considered sufficient to protect said defendant against the plaintiff's action.

EASTERN DIS.  
February, 1841.

LESSASSIER  
VS.  
DASHIELL.

So judicial mortgages resulting from recorded judgments of creditors of a tutor, acquired under the faith and protection of a decree of a court of competent jurisdiction, which had never been annulled or attacked, will be satisfied in preference to the minor's general mortgage purporting to have been raised by this judgment.

The law of 1830, entitled "an act in addition to the laws now in force relative to tutors and curators of minors" appears to have been intended to apply to the surviving father or mother as natural tutor or tutrix; but the 8th section thereof seems to have been passed in relation to *all cases* where special mortgages are to be given by tutors or curators; it is in these words: "In all cases where special mortgages shall be given by curators or tutors in lieu of the legal mortgage existing in such cases, as recognized by law, it shall be the duty of the judge receiving such special mortgage to cause the property proposed to be mortgaged, to be *appraised by experts*, in the same manner as is provided when adjudications of the property of minors are made to the surviving father or mo-

**EASTERN DIS.** ther, and *the said judge shall in no case accept the said mortgage* unless the value of the property so appraised shall exceed, exclusive of all prior liens, privileges or mortgages, the amount of the debts or rights of the minors intended to be secured by the said special mortgage, by at least 25 per cent., in addition to the amount of the said debts or rights, *to be ascertained* by a previous liquidation to be made according to law in the office of the judge having jurisdiction of the said matter, and including all interest which may probably accrue."—It is perfectly clear that the judgment homologating the deliberation of a family meeting, does not complete the proceedings under which the special mortgage is to be received; their consent or approbation is not required to enable the tutor to furnish a special in lieu of the general mortgage, although until their decision, which is a prerequisite to its acceptance, the court cannot make any change in the security of the minor; *2 La. Rep.* 536. The property proposed to be mortgaged must be appraised by experts, so as to shew its real value, and the parish judge can, *in no case*, accept the mortgage, unless the value of the property, be ascertained to exceed 25 per cent., &c.—Now, in this case, the judgment relied on, is only *conditional*, and provides for the releasing of the general mortgage, after the special mortgage shall have been executed. It was undoubtedly

LESASSIER  
vs.  
DASHIELL

And where no experts were appointed, no previous liquidation of the minor's rights had and the act of special mortgage not accepted by the Judge or under tutor, and never sanctioned by the court of probates, such proceedings will not even authorize the purchaser from the tutor to disregard the minor's general mortgage.

the intention of the family meeting that it should be received and accepted by the judge for the *benefit of the minor*, as under the seventh section of the act of 1830, this law must have been read to them by the notary, and they clearly had in view the provisions contained in the eighth section.—Still, no experts were appointed, no previous liquidation of the vendor's rights was made, and the act of special mortgage was passed by a simple notarial act, which never was accepted by any one, and never sanctioned by the court of probates, such proceedings will not even by the under tutor; said special mortgage was not received by the judge as required by the article 3309 of the Louisiana Code, and never obtained the definitive sanction of the Court of Probates, so as to give to it the effect contemplated by the decree of homologation.

Under such circumstances, we cannot consider the judgment of the Probate Court relied on by the defendant, as definitive and sufficient to justify him, when he purchased from the tutor, in concluding that the general mortgage in favor of the plaintiff had ceased to exist, and had said defendant enquired, as he was bound to do, how the rights of the minor were really secured, he would have easily ascertained that the subsequent formalities had never been complied with, that the special mortgage had been passed without the interference and acceptance of the parish judge, and that, therefore, no effect could be given to the conditional and provisional judgment homologating the proceedings of the family meeting.

With this view of the question, we think the plaintiff has sufficiently maintained his defence against defendant's opposition, and that the judge *a quo* erred in ordering the seizure and sale to be set aside.

The other ground of opposition set up by defendant, against the judgment by which the rights of the plaintiff against his tutor were liquidated, appears also to be unfounded. No evidence has been adduced to show that the amount claimed was not really due; said judgment is not attacked as fraudulent or collusive, and it is *prima facie* evidence that the sum, the payment of which is secured by legal mortgage, is justly due.—1 *La. Rep.*, 379; 8 *idem*, 199.

It is therefore ordered, adjudged and decreed that the judgment of the District Court, be annulled, avoided and reversed; and this court proceeding to render such judgment as ought to have been rendered by the lower court, it is ordered, adjudged and decreed that the opposition made by the defendant and appellee to the order of seizure and sale heretofore obtained by plaintiff and appellant be overruled; that the injunction sued out be dissolved, and that said plaintiff be authorized to proceed with the said decree of seizure and sale according to law; the costs of the opposition in the court below, and those of this appeal to be borne by said defendant and appellee.

EASTERN DIS.  
February, 1841.

LESASSIER  
vs.  
DASHIELL.

But where the proceedings in the court of probates do not conform to all the provisions and formalities of the law required in giving special in lieu of a general mortgage, the judgment rendered therein is not sufficient to protect purchasers against the minor's general mortgage.

A judgment not attacked as fraudulent or collusive is *prima facie* evidence that the sum for which it is rendered, is justly due the minor.



EASTERN DIS.  
February, 1841.

ROUSSEAU *vs.* HIS CREDITORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

ROUSSEAU  
vs.  
HIS CREDITORS.

According to the Civil Code of 1808, costs of suits against an insolvent debtor *previous* to his failure, and *taxed costs* of every kind were entitled to be paid by privilege under the denomination of *law charges*.

Under the Louisiana Code, *law charges* are defined to be costs incurred in court in the prosecution of a suit, to be paid by the party cast; and the creditor is entitled to a privilege when the costs, he claims are *taxed costs*; whether in a suit previously to, or in the *concurso*, against the insolvent debtor's estate.

This case arises on an opposition made by Gueseppe Giordano to the homologation of the tableau of distribution filed by the syndic of the creditors in this case.

The opponent alleges that besides his mortgage claim, he is a privileged creditor of the insolvent's estate in the sum of \$55 62, for clerk's and sheriff's fees, by him advanced in a certain suit in which he had judgment for costs against said insolvent. He prays that the tableau be so amended as to allow this sum as a privilege debt, and also for some other claims.

The District Judge in rendering judgment stated the case thus:—"The question presented for consideration in this case is, whether the privilege granted to law charges by the Code extends to all cases, which the insolvent may have been condemned to pay in the various suits against him previous to his failure; or whether such privilege be confined to the costs incurred in the *concurso*." There was judgment denying this as a privilege claim and overruling the opposition. The opposing creditor appealed.

*D. Seghers*, for the appellant.

*Pepin*, for the syndic.

*Simon J.* delivered the opinion of the court.

The only question submitted to our consideration in this case, is whether under the Louisiana Code, the privilege granted to law charges ought to be extended to such costs as

may have been occasioned by the prosecution of suits against an insolvent debtor previous to his failure? or whether such privilege ought to be limited to the costs incurred in the *concurso* and for the benefit of the mass of creditors?

EASTERN Dis.  
February, 1841.

ROUSSEAU  
vs.  
HIS CREDITORS.

Under the old Civil Code, as early as 1812, the jurisprudence of this court had repeatedly recognized that the *law charges* contemplated by the art. 73, page 468, were *taxed costs*. 2 *Martin*, 264.—5 *Idem* 468; that general professional services rendered by an attorney, were no part of the privileged *law charges* or *taxed costs*. 2 *Idem* 242.—3 *Idem* 282; and in the case of *Turpin vs. his creditors*, 7 *Idem* 54, it was held again that the costs of suits against an insolvent, previous to his failure, were privileged on his estate. The point was thus so well settled that it had become a well known rule under the old Code that taxed costs of every kind were entitled to the privilege allowed under the denomination of *law charges*.

According to the Civil Code of 1808, costs of suits against an insolvent debtor previous to his failure; and *taxed costs* of every kind were entitled to be paid by privilege under the denomination of *law charges*.

The Louisiana Code has re-enacted the same provisions with regard to *law charges*, arts. 3158 and 3219; and were these articles to be made exclusively the subject of this investigation, there would be no difficulty in maintaining our former jurisprudence. But it is contended by the counsel for the appellee, that our law on this subject, has undergone very material changes and modifications by the enactment of the articles 3162, 3163, 3164 and 3165, contained in the section 2 under the head of *law charges*; and that the general interpretation heretofore given by this court to the art. 73, p. 468 of the Old Code, and the construction of the arts. 3162 and 3, are now restrained by the art. 3164, from which, it is evident, that the privilege in cases of insolvency, ought to be allowed to those costs only, which are incurred for the general benefit of the creditors. The art. 3162 is in these words:—"Law charges are such as are occasioned by the prosecution of a suit before the court. But this name applies more particularly to the costs, which the party cast has to pay to the

EASTERN DIS. party gaining the cause. It is IN FAVOR OF THESE ONLY  
February, 1841. *that the law grants the privilege.*—This, in our opinion,

ROUSSEAU  
 VS.  
 HIS CREDITORS. gives a clear definition of what the law means by "*law*  
*charges,*" and indicates the extent of the privilege by which  
 their recovery is secured. The *art. 3163* explains how and  
 to what extent the privilege is to be enjoyed, and limits it to  
 such costs as are taxed according to law, and such as arise  
 from the execution of the judgment. So far, these new laws  
 agree with our former jurisprudence, and would be rather  
 considered as confirmatory of the repeated decisions of this  
 court, unless modified or further restrained by the subsequent  
 articles.—the *art. 3164*, relied on by the appellee, is as fol-  
 lows: "*The costs for affixing seals and making inventories*  
*for the better preservation of the debtor's property; those*  
*which occur in cases of failure or cession of property for*  
*the general benefit of creditors, such as fees to lawyers*  
*appointed by the court to represent absent creditors, com-*  
*missions to syndics; and finally, costs incurred for the*  
*administration of estates, which are either vacant or be-*  
*longing to absent heirs, ENJOY THE PRIVILEGES ESTABLISHED*  
*IN FAVOR OF LAW CHARGES:—*"—And it is urged that this last  
 article shows the restricted sense of the privilege granted by  
 the preceding ones; we think differently; it seems to us that  
 this *art. 3164*, far from restricting the privilege, has been  
 passed for the purpose of extending it to such claims as would  
 not be comprised in the general definition of law charges  
 given by the *art. 3162*, as most of those claims have nothing  
 to do with the prosecution of suits before the courts, and  
 relate more particularly to the costs incurred in such estates  
 as are administered for the benefit of a *concurso* of creditors.  
 This *art.* does not say that the costs therein mentioned shall be  
*the only costs* entitled to enjoy the right of privilege establish-  
 ed in favor of *law charges* or *judicial expenses*, and in our  
 opinion it would be absurd to give it such construction as to  
 defeat the right recognized by the provisions contained in the

two previous articles. Besides, this is also sufficiently explained by the *art.* 3165; from which it is clear, under the well known rule "*exclusio unius est inclusio alterius*," that the creditor is entitled to enjoy the privilege, when the costs which he claims, are *taxed costs*, or are *included* among those mentioned in the preceding articles.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed; that the opposition filed by G. Giordano to the tableau of distribution filed by the syndic be maintained, so far as he claims to be placed on the said tableau as a privileged creditor for the *taxed costs* therein mentioned, and that the said tableau be amended accordingly, the costs in both courts to be borne by the insolvent estate.

EASTERN DIS.  
February, 1841.

NEILSON  
VS.  
POOL.

Under the Louisiana Code, law charges are defined to be costs incurred in court in the prosecution of a suit, to be paid by the party cast; and the creditor is entitled to a privilege when the costs, he claims are *taxed costs*; whether in a suit previously to, or in the *concurso*, against the insolvent debtor's estate.

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NEILSON vs. POOL.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, FOR THE PARISH OF

IBERVILLE, THE JUDGE OF THE SECOND DISTRICT PRESIDING:

Where the petition alleges "the defendant is taking off his crop," and the affidavit declares all the facts in the petition to "*be true*;" "that the defendant is reputed insolvent and unable to pay his debts," it is sufficient to support the sequestration of his crop.

The petition and prayer for a sequestration and for judgment on the note when *it becomes due*, may be considered a conservatory measure; and the filing of an amended petition after the note is actually due, with a prayer for judgment, be taken as the inception of the suit.

This is an action on a promissory note. The note of defendant became due on the 1st December, 1839, and suit was

**EASTERN** Dis. commenced the 3d September preceding. The plaintiff alleges in his petition that the note was given for the balance due him on a settlement for his wages as an overseer, with a mortgage and privilege on the growing crop; that the defendant he fears and verily believes intends to send off the cotton crop as fast as it is picked, out of the jurisdiction of the court and dispose of it during the pendency of this suit: wherefore he prays that the crop of cotton then growing and being picked out be sequestered and that he have judgment for the amount of his said note, when it becomes due, together with his lien or privilege of on said cotton.

**February, 1841.**

**NEILSON**  
**vs.**  
**POOL.**

On the 1st of February, 1840, a supplemental petition was filed setting out the same facts and containing the same allegations, except as to the sequestration, which had been already obtained, praying for judgment on the note, with a privilege or lien on the cotton and that it be sold to satisfy said judgment.

The plaintiff declares in his affidavit for a sequestration that the facts and allegations in the petition are true; that he fears and believes the defendant will remove his cotton crop from the jurisdiction of the court and out of the State before his debt becomes due; and deprive him of the only security he has for the payment of his debt, as he is reputed to be insolvent and unable to pay his debts.

There was judgment by default duly taken and rendered on these petitions, but before final judgment the defendant filed his answer. He avers the suit was prematurely brought before the note became due and payable; that the affidavit is insufficient, inasmuch as it shows no cause for a sequestration; that he has shown no just cause to suspect that defendant would remove the cotton crop on which the privilege is claimed, but was actuated by malicious feeling with a view to injure and cause the defendant damage. He further avers that the two petitions filed are in the nature of two suits for the same debt; that the supplemental petition was filed without leave of the

court or consent, and is an original petition which should be dismissed, because two suits cannot be pending at the same time, that no cause of action existed on the 3d September when the first petition was filed, and that he is not, nor was not liable in that suit. He therefore prays that these suits be dismissed; that he have judgment in reconvention for the wrongful suing out of the sequestration in the sum of \$200 special damages, and \$800 general damages, &c.

**EASTERN Dis.**  
**February, 1841.**

**NEILSON**  
**vs.**  
**POOL.**

Upon these pleadings and issues the case was tried.

The note, and an act of mortgage which had been drawn up and signed, giving a mortgage on the crop to secure the payment of the note, were offered in evidence.

It was shown that when the note became due, payment was demanded at the Union Bank, and it was duly protested for non-payment.

There was judgment for the plaintiff and the defendant appealed.

*Edwards*, for the plaintiff.

*Ives*, contra.

*Martin, J.* delivered the opinion of the court.

This is an action against the maker of a promissory note given for overseer's wages, secured by a special mortgage attempted to be given on the growing crop of the defendant. The note is payable on the first of December, 1839, at the Union Bank in Plaquemine. Suit was instituted the 3d September, 1839, and the crop sequestered on the affidavit of the plaintiff, that the defendant was about to gather and remove it beyond the jurisdiction of the court and beyond the limits of the state. He prays for judgment on the note as soon as it becomes due, and that his sequestration be maintained.

On the 7th February, 1840, an amended petition was filed, including the note and debt first sued on, and judgment is prayed thereon. Judgment by default was taken on the ori-



EASTERN Dis. ginal and amended petition, and was afterwards set aside on  
February, 1841. answer filed.

NEILSON  
 vs.  
 POOL.

The defendant avers that the suit is premature, having been instituted three months before the note became due; and the amended petition is in the nature of a second suit for the same debt, instituted during the pendency of the first and cannot be maintained. He avers that he has sustained damages in consequence of the suing out of the sequestration, which he expressly charges to have been illegally done and without cause. He prays that the suit be dismissed and that he have judgment for damages and his costs.

There was judgment for the plaintiff on these pleadings, and the defendant appealed.

Where the petition alleges "the defendant is taking off his crop," and the affidavit declares all the facts in the petition "to be true"; "that the defendant is reputed insolvent and unable to pay his debts," it is sufficient to support the sequestration of his crop. It does not appear that the sequestration was improperly granted. The objection to it is that the affidavit does not state the facts on which the plaintiff grounds his apprehension that the defendant will remove the cotton from the jurisdiction of the court and the state.

The petition states that the defendant *is taking off the crop*, "and the affidavit declares all the facts mentioned in the petition are true. It further states that the defendant is reputed insolvent and unable to pay his debts." These are the facts presented as creating the apprehension which induced the plaintiff to avail himself of the sequestration. It is not pretended that they are untrue. The affidavit is therefore sufficient.

The petition and prayer for a sequestration and for judgment on the note when it becomes due, may be considered a conservatory measure; and the filing of an amended petition after the note is actually due with a prayer for judgment be taken as the inception of the suit. The original suit in this case was commenced by an application for an order of sequestration, three months before the debt became due, but the note was annexed and judgment prayed for, when it actually became due.

The supplemental petition filed after the note was really due, may well be considered as the inception of the suit; as the first petition contained only the application and grounds for a conservatory measure. *Code of Practice, article 208, Williams vs. Duer, 14 La. Reports, 531.*

On the trial, the note was produced and proved to have been given for the amount due the plaintiff, for his wages as an overseer of the defendant, in making the crop then growing and about being gathered. The property sequestered was part of this crop on the defendant's plantation.

EASTERN DIS.  
March, 1841.  
FLOWER ET AL.  
VS.  
O'CONNOR:

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

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**FLOWER Et AL. vs. O'CONNOR.**

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF WEST FELICIANA, JUDGE MORGAN THEN JUDGE OF THE DISTRICT, PRESIDING.

Where it is established that the defendant has been judicially notified of the titles or claim which is the foundation of the demand for the whole of the property or debt, so as to acquire a sufficient knowledge of the rights, sought to be enforced against him there results a *legal interruption of prescription* in favor of those to whom such rights belong.

So where suit is brought on a promissory note by D. F. as the surviving partner of the commercial firm of D. B. F. & Co., who was non suited, yet it being for the whole amount of the claim or note, caused such an interruption in favor of the plaintiffs or firm, as to destroy the defendant's plea of prescription.

This is a suit instituted the 27th November, 1837, by the surviving partners, and the heirs and legal representatives of the deceased ones, lately composing the commercial firm of D. B. Finley & Co., on a promissory note executed the 10th June, 1818, by Bell & Finley, payable to the said firm of D. B. Finley & Co., the 10th March, 1821. The plaintiffs allege that Mrs. Rachel O'Connor is liable and bound to pay said note which was given for four thousand nine hundred and forty-four dollars and eighty-nine cents; because, after the dissolution of the partnership between Bell & Finley, the

**EASTERN DIS.** former assumed and became bound for all the partnership  
**March, 1841.** debts, and having died the defendant, his mother accepted his  
**FLOWER ET AL.** succession with the benefit of inventory, but received prop-  
**VS.** erty belonging thereto which she appropriated to her own  
**O'CONNOR.** use, abundantly sufficient to pay the debts. That his mother  
being the sole heir of said Stephen Bell, receiving and ap-  
propriating his estate to her own use, is liable for the debts.  
The plaintiffs pray judgment for the amount of the note  
sued on.

The defendant denied specially the authority of the plain-  
tiffs to institute suit; and pleaded a general denial to all the  
allegations in the petition; and also pleaded the prescription  
of five and ten years.

Upon these pleadings and issues the cause was tried.

The plaintiffs offered the probate proceedings in the estates  
of the deceased partners and the authority of their heirs and  
legal representatives to sue, in evidence. The record and  
proceedings of a suit instituted in the month of April, 1827, by  
David Flower, *as surviving partner* of the late commercial  
firm of D. B. Finley & Co., against the same defendant on  
this note was also offered in evidence, in support of the plea of  
prescription. This case finally terminated in the Supreme  
Court in August, 1834, in a judgment of non-suit. Subse-  
quently, as it appears, the same action was re-commenced by  
all the partners and representatives of the deceased partners,  
and in all other respects in the same form.

There was evidence of the defendant's liability for her son's  
debts, who was one of the makers of the note sued on.

The District Judge was of opinion that there was not an in-  
terruption of prescription in the former suit, to destroy that plea  
in the present. There was judgment for the defendant and the  
plaintiffs appealed.

*Bullard & Thomas*, for the plaintiffs.

*Turner, R. N. & A. N. Ogden*, for the defendant.

*Simon, J.* delivered the opinion of the court.

EASTERN DIS.  
March, 1841.

FLOWER ET AL.

VS.  
O'CONNOR.

This is an action instituted on a note of hand, dated 10th of June, 1818, drawn by Bell & Finley, and made payable on the 10th of March, 1821, to the order of the late commercial firm of D. B. Finley & Co., composed of David B. and Michael L. Finley and of William and David Flower. Defendant, who is sued as the only heir of her deceased son, Stephen Bell, denies plaintiffs' authority and capacity to bring this suit, pleads the general issue, and avers that plaintiffs' demand is barred by the prescriptions of five and ten years. This peremptory exception was sustained by the lower court, who rendered judgment thereon in favor of the defendant, and the plaintiffs appealed.

The evidence shows that in April 1827, a suit was brought against the present defendant, by David Flower, *as surviving partner of the late commercial firm of D. B. Finley & Co., for the use of W. & D. Flower*, to recover from her as the heir of her deceased son, the amount of the same note sued on in this action, together with the balance of an account current, forming together a sum of \$6336,86; and that in August, 1834, a judgment was rendered by this court in favor of said defendant against David Flower *as in case of a non suit*. See 7 La. Rep. 194. The present action was instituted on the 20th of November, 1837.

Defendant's plea of prescription is met by the plaintiffs who contend that the suit brought by David Flower, *as surviving partner, and for the use of W. and D. Flower*, must have the effect of interrupting the prescription; that the parties plaintiffs to said suit, were substantially, though not identically the same; but were exercising the same right by virtue of the same cause of action, and that therefore, though the first suit was dismissed for want of right in the plaintiff to institute the action in that form, it should yet work a legal interruption.

On the other hand, defendant insists that the first suit cannot benefit the plaintiffs in this action, so as to cause an interrup-

**EASTERN DIS.** tion of the prescription in their favor, as the former suit was  
**March, 1841.** instituted by a surviving partner who did not possess the right  
**FLOWER ET AL.** of suing for the partnership debts; that the maxim of law  
**VS.** “*à persona ad personam non fit interruptio active nec passi-*  
**O'CONNOR.** *và,*” is particularly applicable to the present case, and he  
relies on the authority of *Troplong Vol. 2. Nos. 627 and 657*,  
to show that the obligation sued on had been extinguished  
or released by prescription long before the date of this action;  
which prescription his client has acquired against all the plain-  
tiffs; and if not against all, at least against those who were not  
parties to the former suit.

It is a well settled doctrine in our jurisprudence that one of  
the modes of interrupting prescription is by citing the posses-  
sor or debtor before a court of justice; that it matters not  
whether the suit is brought before a court of competent jurisdic-  
tion or not; that prescription is interrupted by a suit, though  
the plaintiff therein be nonsuited; that a mistake ought not to  
destroy the effect of such suit, when the error occurs in the  
manner of prosecuting it, in consequence of which it may be  
dismissed; and that the same rules which on this special sub-  
ject, govern in cases of prescription by which property is ac-  
quired, are also applicable to the prescription *liberandi causâ*.  
*La. Code, articles 3484, 3516 and 3517. Chretien vs.*  
*Theard, 2 Martin, N. S., 582. Prall vs. Peet's curator,*  
*3 La. Rep., 274. 4 Idem, 152. 4 Idem, 418. 12 Idem, 530.*  
There would then be no doubt, if the first action had been  
instituted in the names of all the partners of the late firm of  
D. B. Finley & Co., or of their representatives; as the pre-  
scription would clearly be interrupted.

But the question which is now submitted to our consideration  
arises from the legal maxim above quoted and relied on by de-  
fendant's counsel, and we are ready to admit that it is not  
free from difficulty. “*Lorsqu'on demande,*” says *Troplong,*  
*prescription, Vol. 2, No. 627, si les effets de la prescription*  
*obtenue contre une personne, doivent s'étendre à d'autres, il*

*faut nécessairement distinguer la qualité des obligations. Il y en a de principales, il y en a d'accessoires; celles qui sont principales envers chaque obligé, donnent lieu à autant de prescriptions principales qu'il y a de personnes, et ce qui a été prescrit au profit de l'un ou contre l'un, ne s'étend pas aux autres:*—Thence, the maxim "*à persona ad personam non fit interruptio.*" This maxim establishes a general rule, to which there are many exceptions which the author proceeds to examine. In No. 649, he says: "*L'interruption faite pour l'un des cohéritiers ne profite pas aux autres. Chacun agit dans un intérêt distinct;*" but the rule appears to be more clearly illustrated with regard to the question under consideration, in No. 652, in these words: "*Lorsque le propriétaire, pour partie d'un héritage, a donné une demande en revendication* POUR LA PART QUI LUI EN APPARTIENT *contre un possesseur qui la détient pour le total, cette demande n'interrompt la possession que* POUR LA PART *du demandeur.*" This is also the doctrine entertained by Pothier in his *traité des prescriptions* No. 54, from which it necessarily results that the rule or maxim is properly and particularly applicable to cases in which the obligation is "*principale envers chaque obligé,*" so as to be made the subject of a distinct demand against each of the co-obligors for his portion; or when the demand has been instituted by one of the co-proprietors or co-obligees for his share of the property or of the debt, a part of which is the object of the action.

But in this case, the suit was brought by one of the co-obligees, that is to say: by one of the members of a late firm as surviving partner, &c.; not for his own individual share, but for the whole amount of the debt due to the partnership, and for the benefit of all the members thereof; he took upon himself to act as their *negotiorum gestor*, and had the partnership been yet in existence, we are not ready to say that this would not have been sufficient to bring the case within the sixth exception examined by Troplong, No. 643, in which he says:



**EASTERN DIS.** "Une sixième exception a lieu toutes les fois qu'on peut  
**March, 1841.** supposer que celui qui a interrompu a agi non seulement  
**FLOWER ET AL.** dans son propre intérêt, mais encore comme mandataire  
**VS.** d'une autre personne qui lui a donné pouvoir tacite."—As in  
**O'CONNOR.**

such case, it might be fairly supposed that the suing partner, being in possession of the obligation, was acting as the tacit agent of the firm; particularly as this circumstance would give him a right to receive and even to enforce the payment of the obligation: *Duranton*, Vol. 11, No. 166. *Pardessus*, *droit commercial* No. 181, and such suit brought under such circumstances would undoubtedly operate an interruption of the prescription in favor of all the co-obligees.

The difference however in the present instance, is that the action was instituted by a surviving partner after the dissolution of the partnership, and at a time when he had no right to sue for or receive partnership debts, without being authorized by the court of probates, and when he could not act any further as the agent or *negotiorum gestor* of a firm which had ceased to exist. 3 *La. Rep.* 357.—7 *Idem* 194.

We are satisfied however, after having bestowed on this question all the attention which its importance requires, that though David Flower could not maintain the action in his individual name, the fact of its having been instituted *for the whole amount* of the note, must take it out of the general application of the legal maxim relied on by the defendant; and we base our opinion on the authority of *Pothier*, *Loco citato*, who goes on to say: *Si par la communication que le possesseur a eue des titres du demandeur, qui sont des titres COMMUNS A CE DEMANDEUR ET A SES CO-PROPRIETAIRES, ledit possesseur a été instruit du droit de propriété qu'ont lesdits co-propriétaires; cette circonstance, &c. &c., interrompt aussi et arrête le cours de la prescription pour les parts desdits co-propriétaires.*"—"C'est pourquoi, lorsque par la suite, lesdits propriétaires donneront demande contre ce possesseur pour leurs parts; s'il leur oppose qu'il a accompli le tems de

*la prescription pour ces parts avant leur demande, ils seront bien fondés à lui répondre, qu'il n'a pas accompli la prescription, et qu'elle a été interrompu par la connaissance de leur droit qu'il a acquise par les titres qui lui ont été communiqués dans le procès qu'il a eu, sur la première demande qui a été donnée contre lui."* It is clear from this

doctrine of Pothier, that in order to determine the effect and extent of a legal interruption, we must enquire more particularly into the object and cause of the action, than into the right of the plaintiff, the manner in which it is prosecuted and the competency of the court in which it is instituted; and endeavour to ascertain how far the knowledge of the titles on which the action is founded, has been brought home to the defendant by the judicial demand; and we do not hesitate to conclude that, if it be established that the defendant has been judicially notified of the titles which are the foundation of the demand for the whole of the property or of the debt, so as to acquire a sufficient knowledge of the rights which are sought to be enforced against him by a suit, there results from said suit a legal interruption in favor of those to whom such rights may belong. This seems also to be the true spirit of our law on this subject, as from the expressions of the *art. 3484* of the Louisiana Code, to wit: "*a legal interruption takes place, when the possessor has been cited to appear before a court of justice, on account either of the property or of the possession;*" the law appears to contemplate that the object and cause of the action, ought to be the principal criterions which should be resorted to for the purpose of ascertaining the fact, and the extent of the interruption resulting from a judicial demand.

We are therefore of opinion that the suit instituted by David Flower for the whole amount of the claim now set up by plaintiffs, has caused such an interruption in favor of all said plaintiffs as to destroy the defendant's plea of prescription, and that the District Judge erred in sustaining said plea.

*EASTERN DIS.*  
*March, 1841.*  
*FLOWER ET AL.*  
*vs.*  
*O'CONNOR.*

Where it is established that the defendant has been judicially notified of the titles or claim which is the foundation of the demand, for the whole of the property or debt, so as to acquire a sufficient knowledge of the rights, sought to be enforced against him, there results a legal interruption of prescription in favor of those to whom such rights belong.

So where suit is brought on a promissory note by D. F. as the surviving partner of the commercial firm of D. B. F. & Co., who was non-suited, yet it being for the whole amount of the claim or note, caused such an interruption in favor of the plaintiffs or firm, as to destroy the defendant's plea of prescription.

**EASTERN Dis.**  
**March, 1841.**

**LAVERGNE'S**  
**HEIRS**  
**vs.**  
**ELKINS' HEIRS.**

On the merits, we think plaintiffs have sufficiently and satisfactorily established their demand against the defendant, who, according to the evidence, is bound, as the only heir of her deceased son, to pay the debts of his succession; and our judgment must be in their favor for the amount claimed in their petition.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and this court proceeding to render such judgment as should have been given in the court below, it is ordered, adjudged and decreed that the plaintiffs do recover of the defendant the sum of four thousand nine hundred and forty-four dollars and eighty-nine cents, with six per cent. interest per annum thereon from judicial demand until paid, with costs in both courts.

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**LAVERGNE'S HEIRS vs. ELKINS' HEIRS.**

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.**

Delivery of the original is not of the essence of a grant, patent, or commission, although the delivery of the thing granted is essential to the validity of the grant. It is not indispensable that the evidence of title should be delivered to the grantee.

If it appears the original grant was never delivered, a copy or the record of it may be given in evidence.

A grant which was complete under the French or Spanish governments of Louisiana, required no confirmation to give it validity under ours.

So a Spanish grant made to the ancestor of the plaintiffs in 1771 of land, and found only in the book of grants, deposited in the Land Office, is held to be sufficient evidence of title.

Possession of the United States to a piece of land cannot avail the party on his plea of prescription, when there is evidence in the public records that the title was in the plaintiff before the treaty of session.

This is a petitory action, instituted by the heirs of their grandfather, Jean Lavergne, to recover a small tract of land lying on the shore of Lake Pontchartrain, near the mouth of the Bayou St. John, in the possession and claimed by the heirs of the late Harvey Elkins.

EASTERN DIS.  
March, 1841.

LAVERGNE'S  
HEIRS  
VS.  
ELKINS' HEIRS.

The plaintiffs allege that their grandfather, Jean Lavergne, obtained on the 1st of August, 1771, from Don Louis Unzaga y Amezaga, Spanish governor of the province of Louisiana, a grant or concession of land near the mouth of Bayou St. Jean, on Lake Pontchartrain, bounded on one side by the lands of the Post of Bayou St. John; on the other by lands of one Bellegarde, and on the third side by Lake Pontchartrain, forming a triangle.

They further show that Jean Lavergne died shortly after said grant, leaving an only son and heir, Nicholas Lavergne, their father, then very young; that said property has never been sold or alienated, but has continued to be the property of the original grantee and his heirs; that Harvey Elkins took possession of this land in his lifetime under a pretended sale from the Secretary of War, and held it until his death in 1834, when by the provisions of his will it was bequeathed to S. Elkins, his nephew, who also died the next year, and it is now claimed by his heirs and legal representatives who refused to give it up. They pray judgment decreeing them to be the true owners, and that they be put in possession thereof.

The defendants by their agent pleaded a general denial, and aver that they hold under the title acquired by Harvey Elkins, who purchased from the government of the United States, through the Secretary of War; that said sale was made in August, 1831, under an act of Congress, authorising the Secretary of War to dispose of certain sites and fortifications, the property of the government. They further aver that they and those under whom they claim, have been in uninterrupted possession of the property now in dispute since the year 1823; wherefore they plead the prescription applicable to such cases.

EASTERN DIS.  
March, 1841.

LAVERGNE'S  
HEIRS  
vs.  
ELKINS' HEIRS.

Upon these pleadings and issues the case was tried.

The plaintiffs, after accounting for the absence of the grant to their ancestor, produced the original book of Spanish grants from the land office in New Orleans in support of their original title. In this book there is contained and recorded a complete grant of land to their ancestor, Jean Lavergne, bearing date in 1771, by Unzaga, then Governor of the Province of Louisiana, but the grant is not signed. They also produced evidence of their descent from Jean Lavergne; which is no longer contested; the *locus in quo* was admitted, and the remaining and sole question is the validity of the grant.

The defendants ancestor, Harvey Elkins, only purchased the site of the ancient fortification or Fort St. John from the Secretary of War; which is not claimed by the plaintiffs. The *locus in quo* lies adjacent to it.

There was judgment for the plaintiffs and the defendants appealed.

*L. Janin*, for the plaintiffs:

1. The loss of the original grant has been sufficiently accounted for to admit a copy taken from the records of complete grants in the land office at New-Orleans, 7 Martin N. S 550. 7 Peters 99. 1 Starke 349, 354.—Jackson & Frier, 16 Johnson's Rep. 196, 10 Johnson 376. 5 Massachusetts 101. Roscoe p. 3 and 4. 6 Peters 363. 12 *Idem* 654.

2. The copy of the grant is objected to, because the Governor's signature is not copied on it. But it is duly attested by the Register as having been taken from the original records, the court will take judicial cognizance, of the manner in which they were kept, it was admitted in the court below (see the judgment of the District Court,) that generally the signature and the heading of its patents were not copied into the record book, and were the case different the burthen of proof would be upon the defendants. Cowan & Hill's edition of Philip's Evid. vol. 3, p. 1163. 10 Wendell's Rep. 654. 4 Bibb's Rep. 406. 7 Peters 85.

3. The records of concessions in the land office at New Orleans were delivered to the American authorities on the transfer of Louisiana, and were always considered as indisputable evidence of the grants therein contained. The recorded grant was by law complete evidence of title. Act of March 2, 1805, (Land laws 520,) 6 Peters 725. American State Papers, Public Laws, vol. 3, p. 401, 407, (Nos. 8, 2, 3,) p. 172 and 249. 2 Birchard's collection, 669.

EASTERN Dis.  
March, 1841.  
LAYERONE'S  
HEIRS  
vs.  
ELKINS' HEIRS.

4. It is objected that the grant was not offered for confirmation. But this was a complete grant anterior to 1800, and required no confirmation. It was not necessary to file it, and the land officers were bound to confirm it without any application, because it was on record. Act of March 2, 1805, Sec. 4. (1 Land laws, 519.) See also 1 Land laws, p. 549. 2 Birchard, 667, 717. American State Papers, Public Laws, vol. 3, p. 402, No. 3.

5. It is said that the grant was forfeited because the land was not inhabited, and O'Reilly's regulations are referred to. 2 Land laws, 204. But they applied only to the Lieutenant Governor, and were expressly confined to certain districts, which do not include the shores of Lake Pontchartrain. Disregarding for a moment the proof of inhabitancy contained in the evidence of Delassize, and the nature of the land (all swamp,) it is a sufficient answer that no condition was inserted in the grant, and the power of Governor Unzaga cannot be questioned. 12 Peters, 438. As a matter of general interest, though unnecessary in the present case, the following references will show how little it was the practice either of the Spanish or the American governments to insist regularly on the performance of conditions which were expressly inserted in order of survey.

2 Public Lands, 259, Nos. 3, 6, 10, 11, 12. Vol. 3, p. 577, claims, 5, 6, 7, 8, 9, 10, &c. Ibid. p. 171 and 172, and 249. Vol. 4, p. 310. Vol. 5, p. 704, 705 and 706. Vol. 1, p. 232. 10 Peters, 322.



EASTERN Dis.  
March, 1841.

LAVERGNE'S  
HEIRS  
VS.  
ELKINS' HEIRS.

6. A complete grant severs the property from the domain, and neither requires a confirmation nor can it be forfeited. 2 White's Recop. 234. (Morales' Reg. No. 20.) 5 Martin Rep. 653. 5 Martin N. S. 35. 9 Martin Rep. 181. 9 Peters 933. 7 Idem 88. 5 Public Lands 704, 5. 5 American Law Journal 22.

7. The forfeiture spoken of in acts of Congress refers expressly only to incomplete grants. 1 Land laws, 518, Sec. 4. Ibid. p. 633, Sec. 1, p. 651, 778, 823.

*J. Slidell & Eustis*, for the defendants and appellants, excepted to the plaintiffs right to recover on the evidence, and contended that the certified copy of the pretended grant from the book of grants in the Land Office should not be received or admitted in evidence because the absence of the original has not been sufficiently accounted for, and no proof has been made that the pretended grantee ever possessed the alleged original.

2. The paper purporting to be a certified copy does not show that the original had ever been signed by the Spanish Governor, Unzaga, or sealed, when the laws and regulations of the Spanish government respecting the granting of the public domain, required that all grants should be signed by the Governor and his official seal annexed.

3. This said certified copy of the pretended grant as well as all the testimony offered in support of the plaintiffs claim should have been rejected by the court, because the claim of plaintiffs had never been presented to the proper officers of the United States for confirmation until a period long subsequent to the sale made by the United States to the defendants.

*Garland, J.* delivered the opinion of the court:

The plaintiffs claim a tract of land lying on the Lake Pontchartrain, at the mouth of the bayou St. John, having a front of three arpents, ten toises and two feet, with a depth of fifteen arpents, eleven toises and three inches in depth, which

they say was granted to Jean Lavergne, their paternal grand-  
 father, by Unzaga, Governor of the province of Louisiana, on  
 the 1st of August, 1771, which they allege is in possession of  
 the defendants. The latter claim the premises under a sale  
 made by the Secretary of War in the month of August, 1831,  
 under the provisions of an act of Congress, entitled "an act  
 authorizing the sale of certain military sites," approved March  
 3d, 1819; by which that officer was authorized to sell such mi-  
 litary sites belonging to the United States, as have been found,  
 or may become useless. They allege the premises made the  
 site of Fort St. John, and were properly sold. They further  
 plead the prescription of ten, twenty and thirty years.

EASTERN DIS.  
 March, 1841.

LAVERGNE'S  
 HEIRS  
 VS.  
 ELKINS' HEIRS.

The title under which the plaintiffs claim, describes the land  
 as bounded on one side by the land of the Post of the Bayou  
 St. John, (lindado por un costada con tierras del puesto, &c.)  
 The witnesses describe the site of the fort as a "mound or  
 elevation made by the Spanish government to build a fort on"  
 the extent of which was not more than one hundred and  
 twenty feet, fronting the bayou, running back seventy or eighty  
 feet, the foundations of which are (or were a short time since)  
 existing, and further that "all that belonged to the fort was  
 within the walls." The land in controversy, appears to be  
 very low and subject to inundation, and other tracts belonging to  
 individuals are contiguous. Harvey Elkins, under whom the  
 defendants claim, took possession of the site of the fort in 1823,  
 but by what authority is not shown.

The evidence satisfies us of the existence of Jean Lavergne,  
 his death in 1774, and that the plaintiffs are his grand-children,  
 and one of the witnesses (Delassise) says he "knew a man  
 named Lavergne, living in the vicinity of the fort, but does  
 not recollect his sir-name," but it does not appear he was on  
 the premises or that the plaintiffs have been since his death.

On the trial, the plaintiffs did not offer the original patent in  
 evidence, but proved there had been two extensive fires in  
 New Orleans where their ancestor formerly resided, that dili-

**EASTERN Dis.**  
**March, 1841.**

**LAVERGNE'S**  
**HEIRS**  
**VS.**  
**ELKINS' HEIRS.**

gent search had been made for it among the papers of the family without success, and also filed their affidavit stating the loss of it, or the strong probability of its being lost. The plaintiffs then offered in evidence, a copy from a book or register of original concessions and complete grants in the office of the Register of the Land Office in New Orleans, which that officer certifies was taken from the records in his possession and formed a part of the archives of his office, by which the land in controversy was granted to Jean Lavergne in 1771. To the reception of this document as evidence the defendants objected:

1st. Because the absence of the original had not been sufficiently accounted for, and further that no proof had been made that the pretended grantee ever possessed the original.

2d. Because from the copy it appears the original was not signed by Governor Unzaga nor did it bear the seal of the provincial government, which the law required all grants of the public domain should have.

3d. Because the claim of the plaintiffs and the testimony in support of it, had never been presented to the proper officers of the United States for recognition, until a period subsequent to the sale by the Secretary of War to Harvey Elkins, under whom the defendants claim the property.

Before proceeding to the consideration of these points, we must remark, that it is not extending entire justice to the judge of the court below, to permit evidence to be submitted for his consideration, under an agreement between the parties, that objections may be subsequently taken on the appeal, to its admissibility; and we should not feel disposed to consider the exceptions filed by the defendants in this court, if it were not, that we can examine the law of the case nearly as well as if the points were presented in the regular mode. But the proper course is, to present all objections to the competency of witnesses and admissibility of evidence to the court that tries the case originally, and if it errs, it will be our duty to correct the

error. We are indifferent as to the form of exceptions, but EASTERN DIS. March, 1841. require all the points raised to be submitted for decision before they are presented to us.

LAVENEXE'S  
HEIRS

VS.  
ELKINS' HEIRS.

The latter part of the first exception seems to present itself for consideration first, because if the grantee never possessed the grant in fact or by legal intendment, it would be difficult to account for the absence of it, and would be a fruitless enquiry. It is here necessary to enquire whether there ever was a grant, upon which point, independent of the affidavit of the parties stating their belief of its having existed, we have had produced before us the original record of complete grants made by the Spanish Governors, in charge of the proper officer of the United States, who by law is the keeper of that description of the archives, obtained from the former sovereigns of the country, in which we find a page bearing evident marks of antiquity, and on it, registered in form, a grant to a person bearing the name of the ancestor of the plaintiffs, for a small tract of land specifying the number of arpents, toises and feet in front and depth, with boundaries well known and established and not the least suspicion of fraud attached to it. Such evidence must go very far to prove the existence of a grant at some time. Then was it ever in the possession of the grantee? The appellants contend it was not, and that delivery is the essence of a grant.

If this proposition were true in all cases, it might be conclusive in this, but we do not so understand the law. The delivery of the thing granted, is an essential to the validity of the grant, but we do not consider it indispensably necessary that the evidence of title should be delivered to the party also. If such were the case a very large proportion of the titles to property in this State would be invalidated. It is well known that the originals of most authentic acts never are delivered to the persons who hold the property and remain forever in the offices of the notaries that pass them. In the case of *Marbury vs. Madison*, 1 Cranch, 138, which was elaborately argued and much considered, the Supreme Court of the United States held that

Delivery of the original is not the essence of a grant, patent, or commission; although the delivery of the thing granted is essential to the validity of the grant. It is not indispensable that the evidence of title should be delivered to the grantee.

EASTERN DIS. a commission is only evidence of an appointment and that a  
 March, 1841.

LAVERGNE'S  
 HEIRS  
 vs.  
 ELKINS' HEIRS.

delivery is not necessary to the validity of letters patent. It is well known that the patents for land, issued by the General Government, are in most instances transmitted by the proper officer of the Treasury Department to the Registers in the different States, for the purpose of being delivered to the proper parties. Many of these complete grants are not delivered for years and in some instances never. Yet it was never doubted the government was divested of all title, and the patent irrevocable, unless for fraud. If a party in all cases, were held to prove that he had possessed an original title before he could give secondary evidence of it, in many cases it would work manifest injustice. It is sufficient in deriving title from the sovereign, to show the party is entitled to the evidence of the supreme will to obtain it, and if from circumstances it cannot be obtained in the most authentic form, the ends of justice are not to be defeated by excluding the next best mode. It cannot be doubted, that if Spain now held this country that the evidence offered would be good against the crown, and we shall hereafter show the United States are not invested with any more authority than the sovereign from whom Louisiana was acquired.

If it appears the original grant was never delivered, a copy or the record of it may be given in evidence. If the grant never was delivered, we think the copy offered or the record itself may properly be received. It now remains to consider whether if it were delivered, the evidence of loss is not sufficient to authorize the reception of the book or copy. It is here proper to remark, that every case of this description has to be decided on its own circumstances, and it is difficult to find precedents for all. The evidence shows us that Jean Lavergne, the grantee, died about three years after the grant. A man named Lavergne lived near the premises, if not on them. Nicholas Lavergne, the father of the plaintiffs, was a minor at the death of his father, he was the only child as it appears; it is therefore highly probable the titles and papers belonging to his father's estate went into the possession of some other

person or were deposited in some public office unknown to him. The practice of leaving title papers to lands in the possession of public officers under the Spanish Government is notorious, many of which were taken from the country under the idea they were private property. It is also shown there were at least two very destructive conflagrations in New Orleans and many public and private papers were lost or consumed. Search has been made in the Land Office to ascertain if the original was there, also among the papers of the ancestor of the plaintiff, and there appears to be no place where the original can probably be found. In the absence of any motive which we can discover to suppress the original, we think enough is proved to authorize the reception of the copy, notwithstanding the grounds stated in the first exception. But it must be remembered, that we consider there is a wide difference in the cases, where the contents of a lost original are endeavored to be proved by parol, and when its loss is to be supplied by a copy taken from a record not suspicious. In the former case, we should require much stronger evidence of the loss, than in the latter. 7 Peters, 77; 1 Starkie, 349, 354-5; Roscoe on Evidence, 3,4; 7 Martin, N. S., 550; 12 Peters, 654.

EASTERN DIS.  
March, 1841.  
LAVERGNE'S  
HEIRS  
VS.  
ELKINS' HEIRS.

The second ground of exception goes more directly to the effect of the document offered as evidence, than to its admissibility. Having decided that secondary evidence might be admitted, we must consider it when offered and give it the effect its weight deserves. This part of the case will be again recurred to.

The third exception is based upon the provisions of the various acts of Congress authorizing and requiring the different descriptions of claims to land derived from the French and Spanish governments to be presented to the officers appointed by that of the United States, for the purposes of recognition and confirmation. The object of those laws was two-fold. In the first place, to ascertain the quantity of land granted and the description of the various tracts, to enable them to know



EASTERN DIS  
March, 1841.

LAYERGNE'S  
HEIRS  
VS.  
ELKINS' HEIRS.

what lands belonged to individuals or the government, and secondly for the purpose of confirming to the claimants, such titles as were imperfect and required further action on the part of the public authorities to complete them. A grant which was complete under the French or Spanish government required no confirmation to give it validity under ours. The government of Spain recognized the perfect titles derived from the French government which preceded it, and the treaty which ceded Louisiana to the United States expressly guarantees to all the inhabitants equal rights and privileges with other citizens and protects and maintains them in the enjoyment of their property. Art. 3 of the treaty of cession. Vol. 1, Land Laws p. 43. 9 Peters, 133. If there existed a doubt upon this point, the language used by the Secretary of the Treasury in his instructions to the Registers of the Land Office at New-Orleans and Opelousas, in the year 1805, would remove it. The two letters are nearly the same. He says "for the present, I will call your attention only to one part of the law." (Meaning the act of Congress of March 2, 1805) "It is enacted by the 4th Section, that persons claiming lands by virtue of legal French or Spanish grants, made before the 1st. of October, 1800, *may* file a notice of their claim with the Register; but that persons claiming either under the two first Sections of the Act, or under incomplete titles, *shall* do it under penalty of their claim being forever barred. You will perceive that the distinction is drawn from the different nature of the claims; that the first species is considered as already established, and not wanting any confirmation from the government of the United States; but it is necessary that the people should be also made to understand it; that they should know it is not intended to disturb their rights, founded on legal grants, and that the object of the first paragraph, is merely to enable them to have their grants recorded in an American office, if they shall think it expedient, and to prevent the possibility of the United States selling through mis-

A grant which was complete under the French or Spanish governments of Louisiana, required no confirmation to give it validity under ours.

take, lands which have already been legally granted." Laws, EASTERN DIS.  
February, 1841. opinions and instructions relative to the Public Lands,—Part 2, p. 667—8—It is impossible to mistake language like this, or to pervert its meaning; and it explodes the idea that Congress ever intended the forfeiture of a complete title from the former sovereigns of Louisiana, merely because it was not presented for registry.

LAVERGNE'S  
HEIRS  
ES.  
ELKINS' HEIRS.

The document in question is, we think, legal evidence, and we come now to the question of its legal effects.

There has been produced to us a book purporting to be a register of complete grants of land made by the French and Spanish governors in Louisiana, which book is in the keeping of the Register of the Land Office in the City of New Orleans, and is proved to be a part of the archives thereof. As to its authenticity we have the internal evidence which the book itself contains. History and tradition inform us, such a record was kept, and although it may not contain a complete registry of all the grants made by the French and Spanish governors of the province of Louisiana, we are not aware that the genuineness of any recorded in it, has been questioned. In a letter written by Morales in 1797, we find in his descriptions of the mode titles to lands were obtained, he mentions, "the book of grants," in which he says the titles were "*noted*." Land Laws, vol. 2, p. 542. In another letter written by the same person to Governor Gayoso, dated March 2, 1799, he requests "the delivery of the registers of grants." Ibid. p. 550. The Secretary of the Treasury in his instruction to the agents of the government in the Territory of Orleans in 1805, speaks of these records and directs copies of them to be made and transmitted to him and to the Registers in other land districts. Vide laws, opinions and instructions relative to the Public Lands—part 2, p. 669. The act of Congress authorizing the board of commissioners to enquire into and report on land titles, mentions the evidence that "may be found of record on the public records of such grants." Land Laws—vol. 1, p. 521.

EASTERN DIS.  
March, 1841.

LAVERGNE'S  
HEIRS  
VS.  
ELKINS' HEIRS.

On the register so authenticated, we find recorded a grant in the usual form, to Jean Lavergne, for the land claimed, calling for specific and existing boundaries, a condition attached to it amounting to a servitude; other grants preceding and following it without any unusual space being left; the whole copied except the names of the Governor and Secretary at the bottom of it and the seal of office. The question is, does this give a title? Morales in one of his letters—2 vol. Land Laws, 542, says, “in order to obtain lands from the Exchequer (*fisco*) the custom is still pursued, which prevailed when the French were masters of the country; except in so far as that government and the intendancy acted in concert; and no other form is or has been observed, than the presentation of a memorial by the petitioner, praying for a certain number of *arpents* and designating their location. In virtue of this, the Surveyor or Commandant of the Post, with the assistance of the neighbours, makes the survey; and if no objection be offered, puts the person in possession, and gives him the papers necessary for having his title drawn out:— This title is issued upon the strength of these papers, a minute of it being preserved in the office in order that it be noted in the book of grants.”

We cannot doubt, that this title would have been a good one under the Spanish government, and we do not believe its force and validity is impaired by the transfer of sovereignty from that government to ours. The property in the land was by it severed from the domain and being once severed, cannot again be re-annexed to it, without some proceeding declaring the severance a nullity. Under the dominion of Spain a mode was prescribed by which titles made on conditions were to be annulled, if they were not performed, but no evidence is produced of any such proceeding. It is not sufficient to deny that the regulations of O'Reilly, Gayoso, or Morales were not complied with, to put the holder of a complete grant upon proof of a performance of the conditions

specified. They were not rigidly insisted on as Morales tells us in the letter referred to.

It is certain that Jean Lavergne must have been in possession of the land, and that it was surveyed is made equally certain, not only from the precision with which the quantity and boundaries are stated, but that a survey and possession were indispensable to the issuing of a title in proper form. The plaintiffs therefore have a sufficient title to the premises and must recover them, unless their rights have been lost by prescription.

The defendants hold under a regular conveyance from the Secretary of War, dated in 1831, and have been in possession of the site of the Fort St. John since about 1823. By whatever authority Harvey Elkins took possession in the latter year is immaterial, as he only possessed the site, which was a small mound or elevation, to which the plaintiffs set up no claim. He does not appear to have had any transferable title to it until 1831, upon which a plea of prescription could rest, since which time ten years have not elapsed. The possession of the United States cannot avail the defendants, there being evidence on the public records that the title was in the plaintiffs before the treaty of cession.

The judgment of the District Court is therefore affirmed with costs.

Bullard J. did not join in this decision not having heard the last argument.

**EASTERN DIS.**  
**March, 1841.**

**LAVERGNE'S**  
**HEIRS**  
**VS.**  
**ELKINS' HEIRS.**

So a Spanish grant made to the ancestor of the plaintiffs in 1771 of land, and found only in the book of grants, deposited in the land office, is held to be sufficient evidence of title.

Possession of the United States to a piece of land cannot avail the party on his plea of prescription, when there is evidence in the public records that the title was in the plaintiffs before the treaty of cession.

EASTERN Dis.  
March, 1841.

UNION BANK *vs.* DUNN ET AL.

UNION BANK  
*vs.*  
DUNN ET AL.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF EAST

PELICIANA, THE JUDGE THEREOF PRESIDING:

An exception which goes to the absolute want of any right in the plaintiff to stand in judgment in any manner, may be pleaded after issue joined on the merits, or at any stage of the cause:

So a branch of the Union Bank has no legal or corporate existence to enable it to sue or stand in judgment; and although the owner of a negotiable instrument, yet having no capacity to sue, no action can be maintained by it on said instrument.

This is an action instituted on a promissory note against the maker and endorsers, which had been discounted at the branch of the Union Bank at Clinton. The petition sets out the name and style of the plaintiffs in the following manner: "The petition of the President and Board of Directors of the branch of the Union Bank of Louisiana at Clinton, &c., whose principal establishment is in the city of New Orleans." On this petition judgment is prayed against the defendants for the amount of the note sued on.

The defendants admitted their signature, but pleaded a general denial to every allegation in the petition. After the cause was at issue, the defendants filed a peremptory exception, expressly declaring, that the Union Bank at Clinton, (plaintiffs,) were wholly incapable and without capacity to sue or stand in judgment, or carry on any suit for or in behalf of the principal Bank in New Orleans, and prayed that this suit be dismissed.

This exception was sustained by the District Judge on the ground that the charter did not authorize the Branch Bank to sue. From judgment rendered therein the plaintiffs appealed.

*Muse & Merrick*, for the plaintiffs insisted on the reversal of the judgment:

1. The Judge *à quo*, erred in permitting a *dilatory plea* to be filed AFTER a regular judgment by default had been render-

ed. See said judgment, page 7 of the record—also the exception, at page 9 of the record;—the exception having been filed nine days *subsequent* to the rendition of the judgment by default. See “an act to amend the Code of Practice, approved the 20th March, 1839,” section 23d; also Code of Practice, art. 344.

EASTERN DIS.  
March, 1841.

UNION BANK.  
VS.  
DUNN ET AL.

2. The Judge, *à quo*, erred in permitting such an exception (or even a peremptory exception *founded on form*) to be filed *after* a regular answer to the merits. See the answer at page 8 of the record, and bearing date the 12th of November, four days prior to the filing of the exception. On this point, *no authorities*, it is humbly conceived, need be cited.

3. The suit (being instituted on a note payable to order and endorsed in blank) should have been sustained *in the form in which it was brought*, BECAUSE, a final judgment rendered therein, either for or against the plaintiffs, would have formed *res judicata* in favor of defendants. See Civil Code, art. 2141, paragraph 1st; also art. 2144. See also the following decisions of this court, (*viz.*) *Banks vs. Easton*, 3 Martin, N. S., 293; *Lacoste vs. De Armas*, 2 L. R., 264; 13 *idem*, 366, *Boswell vs. Zender*.

*Lyons*, for the defendants, contended that peremptory exceptions founded in law may be pleaded even after issue joined, and when the pleadings show a total want of right and capacity in the plaintiffs to stand in judgment, advantage may be taken of it at any stage of the proceedings. Code of Practice, 345, 346; 4 Martin, N. S., 434.

2. The Branch of the Union Bank of Louisiana has no power by charter to sue or be sued. A judgment in favor of the President and Directors of a branch, would not form *res judicata*. Even payment to them would not be good. See charter in session acts of 1831, page 42, sections 1, 9, 33, 34, 35 and 36.

*Morphy, J.* delivered the opinion of the court.



EASTERN DIS.  
March, 1841.

UNION BANK  
vs.  
DUNN ET AL.

The plaintiffs are appellants from a judgment sustaining an exception to their right to maintain this action. The petition is in the name of "the President and Board of Directors of the Branch of the Union Bank of Louisiana at Clinton, whose principal establishment is in the city of New Orleans." We think the judge did not err. There is no such corporation known to our laws as that described in the petition; the branches or offices of discount and deposit created by the act incorporating the Union Bank, are without power or authority to stand in judgment for the mother bank; the latter for all sums due to her either directly or through her branches, must sue in her corporate name, which is "the Union Bank of Louisiana." La. Code, art. 423; Acts of 1832, page 42, sections 1, 9, 33, 34 and 35.

An exception which goes to the absolute want of any right in the plaintiffs to stand in judgment in any manner, may be pleaded after issue joined on the merits or at any stage of the cause.

It is said that defendants having joined issue on the merits, this exception, which is one founded on form, was too late. We believe that it embraces something more than mere form. It goes to the absolute want of any right in plaintiffs to stand in judgment in any form or shape whatever, and can therefore be urged at any stage of the cause. C. Pr., 345 and 346; 4 Martin, N. S., 437. But it is insisted that this suit being on a note payable to order and endorsed in blank should have been sustained in the form in which it was brought, because a final judgment rendered therein, either for or against the plaintiffs would have formed *res judicata*; and we are referred to articles 2141 and 2144 of the Louisiana Code; and also several cases reported in 3 Martin, N. S., 295; 2 La. Rep., 264, and 13 idem, 366. These authorities establish that a note payable to bearer or made to order and endorsed in blank, can be safely paid to any one in possession of it; and that suit can be brought on the same by any holder of such paper without his title to it being questioned, except in certain cases, but from this it does not follow that the right of a plaintiff to stand in judgment cannot be excepted to because the suit is brought on a negotiable instrument. The right to sue as owner which

So a branch of the Union Bank has no legal or corporate existence to enable it to sue or stand in judgment; and altho' the owner of a negotiable instrument, yet having no capacity to sue, no action can be maintained by it on said instrument.

results from the negotiability of such a note is a thing very different from the capacity to sue. The plaintiffs have no legal existence as a corporation, and therefore cannot sue and be sued in a court of justice.

EASTERN DIS.  
March, 1841.

WEEMS  
VS.  
BOYLE ET AL.

It is therefore ordered that the judgment of the District Court be affirmed with costs.

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**WEEMS vs. BOYLE ET AL.**

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF  
WEST FELICIANA, THE JUDGE THEREOF PRESIDING.

Judgment of the inferior court affirmed by consent; damages being waived.

This is an action against the maker and endorser of a note. They pleaded a general denial and admitted their signatures. There was no other defence. The plaintiff had judgment and defendants appealed.

There was an agreement that judgment be confirmed on the plaintiff waiving damages.

*Weems & Dalton*, for the plaintiff.

*Lyons*, contra.

*Simon J.* delivered the opinion of the court.

This case was, by consent of parties, submitted without argument, with an understanding that the judgment of the court below, should be affirmed, the appellee waiving the damages by him prayed for, in his answer, as for a frivolous appeal.

Judgment of  
the inferior  
court affirmed  
by consent; da-  
mages being  
waived.

It is therefore ordered and decreed that the judgment of the district court be affirmed with costs.

EASTERN DIS.  
March, 1841.

LAWSON Et UX. vs. RIPLEY.

LAWSON ET UX.

vs.

RIPLEY.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF

EAST FELICIANA.

Where the object of the suit is to obtain a settlement and liquidation of the community formerly existing between the deceased husband and surviving wife, and for a partition of the residue, after payment of the common debts, the Court of Probates has exclusive jurisdiction.

This court has exclusive jurisdiction of all matters concerning estates; particularly in those cases where they are in a course of administration:

Whenever a question to real property and slaves arises collaterally in the Court of Probates, and an examination of it becomes necessary in order to give the court the means of arriving at a correct conclusion on matters of which it has jurisdiction, it must take cognizance of such title.

Courts of Probate have *not exclusive* jurisdiction in suits for the purpose of dividing property belonging to a legal partnership or community between the surviving spouse and the heirs of the deceased one; but the District Court has concurrent jurisdiction in such cases.

The marriage contract between the deceased spouse and the defendant, is admissible in evidence, although not specially set up in the pleadings, in a suit for the settlement of the community affairs and partition thereof.

Where the title to property brought in marriage was in the party, although not paid for, it became his separate property and remained such at the dissolution of the community.

8075192 Slaves received during marriage, by one of the spouses, *in exchange* or *in payment* of money due him on his separate and individual right, do not become community property.

This is an action by the plaintiffs, as joint administrators of the succession of Gen. E. W. Ripley, deceased, instituted in the Court of Probates, against the defendant, who is the surviving widow, and alleged to have accepted the community of acquests and gains; praying for a sale of so much of said property as may be necessary to pay all the community debts, and that a partition be made of the residue according to law. The plaintiffs expressly allege that a community of acquests and gains existed between the deceased and the defendant, and enumerates the property that was acquired during marriage, alleging there was none other; that the community is largely indebted and sets out the various debts owing. The petitioners

concluded by praying for a sale of so much of said property as may be necessary to pay the debts, and that the remainder be partitioned between plaintiffs and defendant.

EASTERN DIS.  
March, 1841.  
LAWSON ET UX.  
VS.  
RIPLEY.

The defendant excepted and expressly states, that an administrator has no power to sue for a partition; his authority being purely and solely administrative, unless other powers are expressly given by law; and that the court of probates has no jurisdiction of this suit.

2. She further excepted, that no inventory and appraisement had ever been made of all the property belonging to the succession of Gen. Ripley, appertaining to the community of acquests and gains, and that a final partition cannot be made until the same has been legally inventoried and appraised.

In answering, the defendant admits a community of property existed, during her marriage with her deceased husband; that all the property of his succession belongs to the community with the exception of some negroes and stock, which she avers is her separate property. She expressly denies that the community is indebted as alleged; but that the succession of her late husband is largely indebted to the community for monies paid by him out of the community funds, in discharge of his separate debts contracted before marriage. That she is desirous of having a final, legal and definitive partition of all the community effects, but protests against any partial or incomplete partition of the same. She denies generally all the allegations in the petition except such as are admitted in her answer; and prays, if the court takes jurisdiction of this case, that the whole of the property of the succession be decreed to belong to the community of acquests and gains; and that a partition thereof be made according to law.

Upon these pleadings and issues the parties went to trial.

The Judge of Probates sustained his jurisdiction of the suit; overruled the defendant's exceptions, and proceeded to trial on the merits.

The evidence showed that Mrs. Lawson, one of the plain-

EASTERN DIS.  
March, 1841.

LAWSON ET UX.  
VS.  
RIPLEY.

tiffs, is the daughter of Gen. Ripley by a former marriage and his sole heir; that her and her husband are joint administrators of his succession. That some or most of the property found in the succession is the separate property of the spouses, enumerated in the marriage contract which had been entered into between them on their marriage in 1830. This contract indicated the property that each of the spouses owned at the time of marriage, and brought by them respectively into marriage. Among the items of property was an estate in the Parish of East Feliciana, where they resided, designated in the marriage contract as the Redwood tract of land, and some slaves received during marriage from Ira Bowman and Hannah Musgrove. The title to the land had vested in Gen. Ripley, by agreement with his vendor, previous to his marriage, but the notarial act of sale was passed afterwards, and the land, or a greater portion of it remained to be paid for. This with the claims for which certain negroes were received by the deceased during marriage, were all specified in the marriage contract as his separate property.

The Judge of Probates rendered judgment, decreeing the negroes purchased and received from Bowman and Mrs. Musgrove as the separate property of the deceased, and as going to the heir: as also the Redwood estate. He designates the separate property of the two parties, giving that of the deceased to the heir, and the other to the defendant. The community property was equally divided between the plaintiffs and defendant. The defendant appealed.

*Lyons*, for the plaintiffs, contended that the Court of Probates had jurisdiction of the partition of successions between the surviving spouse in community and the heir of the deceased one; and the beneficiary heir may, as administrator, when there are debts to pay sue for such partition; and such suit may be brought in the Probate Court. C. Pr., 924, No. 14; 7 Martin, N. S., 469; 7 La. Rep., 296; 11 idem, 17; 12 idem, 214.

2. The widow in community is not a third person, and in an action of partition when it is a necessary incident of the partition, the Probate Court may enquire into title to real property. 5 Martin, N. S. 214; 8 La. Rep., 459; 15 idem, 455. EASTERN DIS.  
March, 1841.  
LAWSON ET UX.  
VS.  
RIPLEY:

3. Successions are the peculiar objects of the Court of Probates, and it is there they are partitioned. *They are an entire thing.* And as this is an action to make a sale of the community property for the purpose of paying debts, it is necessary to ascertain what that community property is, and the District Court has not jurisdiction of the settlement of a succession, which this is. 15 La. Rep., 36; La. Code, 2374, 1099; C. Pr., 983.

4. The separate property of General Ripley is clearly shown by the marriage contract, which declares what property he "brought into the marriage," and the titles made in pursuance of the contract. La. Code, 2314.

5. The marriage contract is an authentic act and makes full proof between the parties to it, it cannot be contradicted. La. Code, 2231, 2235; 14 Toullier, No. 25; 13 idem, No. 305.

6. The property acquired subsequent to the marriage by General Ripley, was received in payment or exchange for the debts or claims, stipulated in the marriage contract to be laid out in negroes, and consequently became his separate property. 12 Toullier, No. 154; 3 La. Rep. 231; 5 Martin, N. S., 255; 1 La. Rep. 520; 7 idem, 296.

7. The negroes received from Ira Bowman in exchange for the debt of Bennett & Morte, are the separate property of General Ripley: as well as those received from Hannah Musgrove, in payment of a debt due by her. These claims are all explained by the marriage contract. Also, the Redwood estate is shown to have been purchased previous to the marriage and was his separate property, although it may not have been all paid for.

*Preston*, on same side, insisted that the Court of Probates



**EASTERN DIS.** had jurisdiction in this case, although it is admitted that it extends only to successions, or property where the parties are  
March, 1841.  
**LAWSON ET UX.** under the protection of this court. The heir must claim and  
**VS.** sue in an action of partition in the Probate Court, when the  
**REPLEY.** object of the partition is a succession. C. Pr., 924, Nos. 5 and 14; 1021-2, 922, 1025.

2. When the heir accepts with the benefit of inventory the whole property must be administered by an administrator; but it devolves upon the heir subject to a partition, to ascertain the rights of the wife. There is nothing in the law of community adverse to this course. See La. Code, art. 934-5-6-7 and 8, 1025, 1035-6, 1042, 1051, 2394-5-6-8.

3. There is no controversy here about title; it is only as to the mode or manner the parties may divide the property held in community. See the case of *M'Caleb vs. M'Caleb*, 8 La. Rep., 466; 11 idem, 455. Mr. P. argued the case generally on the merits.

*Andrews & Boyle*, for the defendants, contended that the Probate Court was without jurisdiction because it is a court of limited powers and restricted to certain enumerated cases or classes of cases, different from that now under consideration. Its jurisdiction in cases of partitions is limited to successions between heirs and those in which minors, interdicted or absent persons are interested. C. Pr., art. 924, No. 14, 925, 1020-25; 12 La. Rep., 218.

2. On the dissolution of the community of acquets and gains by the death of one of the spouses, the portion to which the survivor is entitled forms no part of the succession of the deceased, though undivided it is separate and distinct from the interest to which the heir is entitled, and rests in the survivor the moment the community is dissolved. The survivor cannot be cited before the Probate Court to partake with the heir, *ratione materiæ vel personæ*. *German vs. Gay et al.*, 9 La. Rep., 580.

3. The Court of Probates has no jurisdiction over cases like *EASTERN DIS. March, 1841.* the present *ratione materiæ* because they are not partitions of *LAWSON ET UX. vs. RIPLEY:* *successions*, nor *ratione personæ* because the surviving spouse does not claim title as heir, nor holds any fiduciary character over which that court has the legal control and supervision.

A fortiori, the Court of Probates is without jurisdiction in the present action where the surviving spouse is cited to partake the community with the heir, and to decide in the contestation what portion of the property sued for is community property and what the separate property of either spouse.

4. The court *a qua* erred in permitting the plaintiffs to introduce a paper purporting to be a marriage contract. It should have been rejected as not having been set out in the pleadings and as calculated to take the defendant by surprise.

If the court was correct in striking out the portions of the answer P. P. because the averments therein contained were not set out with sufficient certainty, it clearly erred in permitting the plaintiffs to introduce a document so important to the issue and so vague in its character without being pleaded at all *Benoit vs. Hebert et al., 1 La. Rep., 262.*

5. The court erred in decreeing the plantation upon Redwood to be the separate property of the late E. W. Ripley.

The evidence proves it to be community property. See agreement with Ingraham, dated 14th July, 1829, recorded 18th February, 1831. Suit of Ingraham *vs.* Hardestie for the same property, filed by E. W. Ripley and signed by him as counsel for Ingraham, 16th July, 1829. Act of sale, Ingraham to Ripley.

The agreement of 14th July, 1829, was not a sale, conveyed no rights to the property therein described, and at all events was not binding on the defendant until recorded. It was not accompanied with possession. The terms and mode of payment do not conform with the act from Ingraham to Ripley, 12th April, 1832, in which no mortgage is reserved in conforming with the stipulations in the agreement.

**EASTERN DIS.**  
**March, 1841.**

**LAWSON ET UX.**  
**VS.**  
**RIPLEY.**

The act of sale seems to be a new and distinct contract, only resembling the agreement in being between the same parties.

6. The court erred in rejecting the testimony of David Bradford, see bill of exceptions, p. 85, showing the conversations of General Ripley on the day of his marriage with the defendant in relation to the agreement with Ingraham, which would have explained whatever seems doubtful in relation to it.

7. The court erred in decreeing the negroes purchased of Ira Bowman and H. Musgrove, to be the separate property of E. W. Ripley. The acts of sale show that they were acquired subsequently to the marriage. See acts, Bowman to Ripley, 15th August, 1830. Musgrove to Ripley, marked (18 & 19) p. p. 60, 61. Civil Code 2314, 2371. 12 La. Rep. 174, *Brown vs. Cobb*. 10 La. Rep. 172.

8. The court erred in permitting the introduction of parole testimony to prove title to immovables. See testimony of Bowman p. 51. Preston and Thomson, 51, 9. Bickham, 52, 64. Keef and other witnesses, p. 64, 8. Bills of exception. p. p. 74, 85, 86. 87.

9. The court erred in reading depositions where due notice had not been made on defendant; and in permitting Atchison the Deputy Sheriff, no longer in office, to amend his return.

10. The court erred in overruling the exception of defendant, that the plaintiffs suing as administrators could not introduce testimony that Mrs. Lawson, the wife, was the heir of the late E. W. Ripley, no allegation to that effect, or that she claimed in that capacity being made in their petition. The final decree of the court is erroneous. It does not conform to the pleadings or to the prayer of petitioners.

*Curry*, for the plaintiffs in conclusion, (representing James Turner of counsel in the case.)

1. The plaintiffs sue as administrators of Gen. Ripley's estate, and ask a sale of the property for the principal purpose of

paying the debts; and as incidental thereto a partition of any balance that may remain is prayed for. In order to bring this about the widow in community is cited and made a party that the proceedings may be had contradictorily with her, who alone with the plaintiffs are interested in the residuum.

EASTERN DIS.  
March, 1841.

LAWSON ET UX.  
VS.  
RIPLEY.

2. The defendant excepts to the jurisdiction of the Probate Court, because a partition is one of the objects sought. This exception was properly overruled. It has been expressly decided in a case contradictorily between the heirs and the mother of a minor claiming the property of the deceased, that an action to annul a will and recover a part of the property, with a prayer that a final partition be made among the parties, can be maintained in the Court of Probates. See the case of *M'Caleb et al. vs. M'Caleb*, 8 La. Rep., 459.

3. In the present case the estate of Gen. Ripley is administered as an insolvent one; and the object of this suit is chiefly to provoke a sale of the property of the succession, lately held in community between him and the defendant, for the purpose of paying the debts for which the community is bound. The prayer for a partition is only incidental to the administration of the estate.

4. In all cases where a succession is in a course of administration, the Probate Court is the proper jurisdiction in which to provoke a sale and partition of the community property or the property of the succession, belonging to the estate administered. C. Pr., 1021 to 1025.

5. The case of *Breau vs. Landry et al.*, (16 La. Rep., 88) recently decided at Opelousas, is very different from the present. There the succession was fully administered and in the hands of third persons. The plaintiff expressly alleges that these persons "have taken illegal possession of said land in virtue of a pretended will and testament of his late wife whereby she bequeathed the said land and part of the improvements to her children," &c. This court very properly overruled the jurisdiction of the Probate Court, because the property is held

EASTERN DIS by an *adverse title*, and in the hands of third persons; and the  
March, 1841. estate of plaintiff's deceased wife had been fully adminis-  
LAWSON ET UX. tered.

VS.  
RIPLEY.

*Simon, J.* delivered the opinion of the court:

This is an action brought by the joint administrators of the succession of E. W. Ripley, deceased, for the purpose of obtaining a partition of the property in community between the deceased and the defendant, after having sold so much of the said community property as may be sufficient to satisfy the debts thereof.

They represent that the deceased intermarried with the defendant on the 29th of July, 1830; that a community of acquests and gains existed between them; that said community is largely indebted, and that the defendant having been decreed to have accepted the community, is liable for her portion of the debts thereof; the petition concludes with a prayer for the sale of a part of the common property, and for a partition of the residue.

The defendant's answer first alleges that the plaintiffs as administrators cannot maintain an action of partition, and that the court of probates is without jurisdiction in such matters. She further avers that complete inventories of the community property have not been made; that a partition cannot be made until the inventories are completed, and that all the property which the deceased died possessed of, belongs to the acquests and gains, except some specified as belonging to herself. She denies the indebtedness of the community as stated in the petition, and states that the succession of her husband owes to the community a sum of \$30,000, used to pay his individual debts; that a tract of land in Illinois has not been inventoried; and prays that the whole property inventoried as belonging to the succession of E. W. Ripley, be adjudged to belong to the community of acquests and gains, and that the same be partitioned according to law.

The probate court overruled the plea to its jurisdiction, tried the cause on its merits, and after indicating in its judgment the property which belongs to the spouses respectively, ordered that all the property inventoried as belonging to the succession of the deceased not therein decreed to be the separate property of the parties, be considered as community property and be partitioned as such. From this judgment the defendant appealed.

**EASTERN DIS.**  
**March, 1841.**  
**LAWSON ET UX.**  
**VS.**  
**RIPLEY.**

Our attention is first drawn to the defendant's exception to the jurisdiction of the Probate Court; and it has been most strenuously insisted on her part that the Court of Probates has no jurisdiction over cases like the present; *ratione materiæ*, because they are not partitions of successions; nor *ratione personæ*, because the surviving spouse does not claim as heir, nor holds any fiduciary character under the control and supervision of that court; and that *a fortiori*, it is without jurisdiction in an action where the surviving spouse is cited to partake the community with the heir of the deceased, and to decide what portion of the property belongs to the community, and which is the separate property of either spouse.

The object of this action is clearly for a settlement and liquidation of the community formerly existing between the deceased and the defendant, and for a partition of the residue after satisfaction of the common debts. Those debts, though due by such community, are generally set up by the creditors against the succession of the husband who, as master of the community during its existence, is always responsible for their payment. After its dissolution by the death of the husband, it is uniformly understood that his estate is bound to pay the debts contracted during the marriage; if it be dissolved by the death of the wife, the survivor is generally alone applied to for the satisfaction of the community debts; and the wife or her representatives, although their distinct interest to the community attaches at the dissolution of the marriage, subject to their right to renounce and be exonerated from the payment

Where the object of the suit is to obtain a settlement and liquidation of the community formerly existing between the deceased husband and surviving wife, and for a partition of the residue, after payment of the common debts, the court of probates has exclusive jurisdiction.



**EASTERN** Dis. of the community debts, have nothing to claim out of the ac-  
March, 1841. quests and gains, until such debts are paid or liquidated. The

**LAWSON ET UX.**

**VS.**  
**RIPLEY.**

This court  
 has exclusive  
 jurisdiction of  
 all matters con-  
 cerning estates;  
 particularly in  
 those cases  
 where they are  
 in a course of  
 administration.

succession of the husband, is therefore so far connected with the community as to form together at the time of his death, an entire mass called his estate, which is not only liable for the payment of the common debts, but also for the portion of the wife or her heirs to the residue, if they have not renounced. The widow or her representatives have consequently such an interest in the mass of the estate or succession of the husband, with regard to whom no distinction is made between his separate property and that of the community until the nett proceeds or amount of the acquests and gains are ascertained, that their assistance at the inventory and their concurrence at all the proceedings relative thereto, which are to be carried on contradictorily with them, are generally required. All such proceedings take place before the court of probates who, according to law, has exclusive jurisdiction of all the matters concerning the estate, particularly in those cases where it is in a course of administration; and it does not occur to us that separate proceedings can properly be had in relation to the community, until after the settlement of the husband's estate and the payment of the common debts, a division of the residue of the acquests and gains, is to be made between the heirs of the deceased and the surviving spouse; and even then, the affairs of the husband's estate administered under the control and supervision of the court of probates, are to be inquired into and sometimes fully investigated.—In this case, the estate of General Ripley, is administered as an insolvent one; the prayer for a partition of the community is only incidental to the administration of the estate; and it seems to us that, if we were to declare the court of probates to be without jurisdiction, this would be in direct opposition to the intention of the law maker whose object is clearly to bring before the courts of probates all the matters relative to estates administered under their superintendence.

But it is contended that this would be giving to the court of probates the right of trying questions of title: Probate Courts have certainly no power to try titles to real estate, and to decide directly on the validity of such titles; but, as this court has said in the case of *Gill vs. Philipps et al.* 6 *Martin N. S.* 298, "those courts possess all powers necessary to carry their jurisdiction into effect, and when in the exercise of that jurisdiction, questions arise collaterally, they must, of necessity, decide them, for if they could not, no other court could:" And, "any other construction would present a singular species of judicial power—the right to decree a partition, without the authority to inquire into the grounds on which it should be ordered, or the portions that each of the parties should take. The end would thus be conceded without the means." *Baillo vs. Wilson et al.* 5 *Martin N. S.* 217. We are satisfied that whenever a question of title to real property and slaves arises collaterally in the court of probates, and an examination of it becomes necessary in order to give the court the means of arriving at a correct conclusion on matters of which it has jurisdiction, it must take cognizance of such title, at least for the purpose of ascertaining which property belongs to either of the spouses respectively or to the community.—In the case of *McCaleb vs. McCaleb*, 8 *Idem* 465, the same doctrine was again sanctioned by this court who held; that Courts of Probates have authority to inquire collaterally into the character of sales and conveyances, which compose a part of the property forming the entire amount to be partaken, in order to enable them to know the amount of the whole estate. See also 12 *La. Rep.* 218.

In the case of *Turner vs. Collins*, 1 *Martin N. S.* 370, it was decided that courts of probates had not exclusive jurisdiction in a suit for the purpose of dividing property belonging to a legal partnership or community, between the surviving spouse and the heirs of the deceased; but this, in our opinion, fully recognizes the jurisdiction of the probate court.—The

EASTERN DIS.  
March, 1841.

LAWSON ET UEN  
VS.  
RIPLEY:

Whenever a question to real property and slaves arises collaterally in the Court of Probates, and an examination of it becomes necessary in order to give the court the means of arriving at a correct conclusion on matters of which it has jurisdiction, it must take cognizance of such title.

Courts of Probate have not exclusive jurisdiction in suits for the purpose of dividing property belonging to a legal partnership or community between the surviving spouse and the heirs of the deceased one; but the District Court has concurrent jurisdiction in such cases.

**EASTERN DIS.** case of *Broussard vs. Bernard*, 3 *Martin N. S.* 37, established also the concurrent jurisdiction of the district court in such cases.—So it was again decided in the case of *Gague vs. Lawson et ux.* March, 1841.

**LAWSON ET UX.**  
**VS.**  
**RIPLEY.**

*Gague*, 3 *Idem* 172. 7 *Idem* 470.—And in the case of *German vs. Gay et al.* 9 *La. Rep.* 584, this court had again occasion to declare that the probate court had not exclusive jurisdiction in a suit for a partition of the community, meaning that its jurisdiction is concurrent with that of the district court. We cannot therefore hesitate to conclude that the present case is properly within the jurisdiction of the court of probates, that the matters in controversy in this action are peculiarly within the province of such courts; although concurrent jurisdiction may be given to the ordinary tribunals; and that the Judge *a quo* did not err in overruling the defendant's declinatory exception.

The marriage contract between the deceased spouse and the defendant, is admissible in evidence, although not specially set up in the pleadings, in a suit for the settlement of the community affairs and partition thereof.

The only bill of exceptions which we have deemed necessary to notice, is one taken to the opinion of the lower court permitting the plaintiffs to introduce in evidence the marriage contract of the parties. The objections made to this document are that it was not set up in the pleadings, did not correspond with the allegations, and had the effect of altering the substance of the demand; we think the Probate Judge did not err: it is true this marriage contract is not specially mentioned in the petition; but the action itself is such as to presuppose that the plaintiffs intended to produce all the titles and documents necessary to establish their right to the separate property of the deceased, so as to show that it makes no part of the community; and the defendant's issue demonstrates sufficiently that she expected said marriage contract to be the principal subject in controversy on the trial of the cause; her allegation that all the property carried on the inventory of the estate, belonged to the community, necessarily required the production of the contract to which she was a party; she was aware of its existence, she knew that the community could not be settled without recurring to this document, and we cannot believe that she was taken by surprise.

On the merits, the appellant urges that the court below erred: 1. Because it decreed the Redwood tract of land to be the separate property of the deceased.—2. Because certain negroes purchased or taken in exchange during the marriage from Ira Bowman, and another received in payment from Hannah Musgrove in part satisfaction of a debt due by her to Gen. Ripley, ought to be declared to belong to the community of acquests and gains.

I. This point arises from the marriage contract produced by the plaintiffs, which, with regard to the Redwood tract of land, contains the following clause: "The said E. W. Ripley declares that he owns and brings into the marriage the following property and rights, to wit:" *"A plantation on Redwood, parish of East Feliciana, of twelve hundred and eighty acres with the buildings, improvements and appurtenances."* This clearly shows that the deceased owned this property at the date of his marriage, (29th July, 1830) the marriage contract being conclusive proof on this subject; but the evidence further establishes that as early as the 14th July, 1829, a written agreement was entered into between the deceased and his vendor, Ingraham, for the purchase of this plantation, on certain terms which are specified in the act signed by both parties; the sale, in our opinion, was complete before the marriage, and the passing of a notarial deed of sale after the marriage was only for the purpose of perfecting the evidence of the contract. If the husband owed any part of the price (this fact also appears by the marriage contract) and paid it during the marriage out of the common funds, this may be a charge against him in favor of the community; but he is nevertheless entitled to the land as his separate property.

EASTERN DIS.  
March, 1841.  
LAWSON ET UX.  
718.  
RIPLEY.

Where the title to property brought in marriage was in the party, although not paid for, it became his separate property and remained such at the dissolution of the community.

II. This also arises from a clause in the marriage contract, which after specifying the incorporeal rights or claims of the husband, goes on to say: "*The following claims set apart to the purchase of negroes, with, to wit: &c. &c.*" The claims alluded to consisted in a dividend of about \$4,000,

**EASTERN DIS.**  
**March, 1841.**

**LAWSON ET UX.**  
**vs.**  
**RIPLEY.**

allowed by act of Congress appropriating \$9,350 to the creditors of Bennett & Martee, and in a claim against Mrs. Musgrove for about \$1,500. It has been shown that the slaves purchased from Ira Bowman were taken in exchange or paid for by the transfer of the sum of \$3500 out of the funds coming to the deceased as a creditor of Bennett & Martee; and that the slave purchased of Mrs. Musgrove, was received by the deceased in payment of a part of the claim mentioned in the marriage contract.—These slaves, under the circumstances, do not, in our opinion, form any part of the community of acquists and gains, not only because it cannot be controverted that the rule, that property acquired during marriage ought to be considered as common to both husband and wife, although purchased with the separate funds of one of them, is only applicable to acquisitions made by purchase, and does not include things which may be received by either of them in exchange or in payment of money due to them on their separate and individual rights; 1 *La. Rep.* 520.—3 *Idem* 231.

Slaves received during marriage, by one of the spouses, in exchange or in payment of money due him on his separate and individual right, do not become community property.

*Case of Dominguez vs. Henry Lee & Co.* lately decided by this court; and 12 *Touillier No.* 154; but more particularly because the investment of the money proceeding from the claims in question had been provided for and agreed upon between the spouses in their marriage contract. According to the *art.* 2393 of the Louisiana Code, "married persons may by their marriage contract, modify the legal community, as they think fit, either by agreeing that the portions shall be unequal, or by specifying the property belonging to either of them, of which the fruits shall not enter into the partnership." We must therefore consider the clause under consideration as a modification of the legal community, so far as the negroes purchased with the claims set apart in the marriage contract for that purpose are concerned, and if so, they cannot belong to the said community.

The appellees have prayed in their answer that the judgment of the probate court be so amended as to allow them the

negroes *Rhoda* and *Rhoda Ann* as the separate property of the deceased; but an attentive perusal of the evidence found in the record has not satisfied us that they do not belong to the community.

We therefore conclude that the judgment of the court below is correct according to the facts and law of the case.

It is therefore ordered, adjudged and decreed that the judgment of the court of probates, be affirmed with costs.

EASTERN Dis.  
March, 1841.  
PERKINS  
vs.  
NETTLES'  
ADMINISTRATOR  
&c.

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**PERKINS vs. NETTLES' ADMINISTRATOR, &c.**

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF EAST  
FELICIANA, THE JUDGE THEREOF PRESIDING:

It may be shown by affidavit in this court that the matter in dispute exceeds 300 dollars, and gives jurisdiction.

The act of March 20, 1839, sec. 19, forbids the dismissal of appeals on the ground of not being returnable to the *next term*, when it does not appear the fault or neglect is imputable to the appellant.

When Judges are required by law to *alternate* in holding courts in their districts, either may grant an appeal from the judgment of the other.

Parties are not to be controlled in the order or manner of introducing the different parts of the evidence of their case.

So the plaintiff may first be allowed to produce the *proces verbal* of sale under which he claims in evidence, before showing that he has complied with the terms of said sale.

This is in the nature of a petitory action to recover a lot of ground which the plaintiff alleges he purchased at the Probate sale of Josiah Nettles' estate, in January, 1835, for the sum of \$156, as the last and highest bidder. That the defendant who is administrator of said estate and tutor of the minors, refused to and still refuses to give him the possession or recognize his



EASTERN DIS. title to said lot; although he has tendered him the price, and  
March, 1841. offered to comply with the the terms of sale, &c. He prays  
PERKINS judgment decreeing him to be the owner of said lot, &c.  
vs.  
NETTLES' The defendant excepted on the ground that there was no al-  
ADMINISTRATOR legation that the plaintiff was in possession of the lot, and no  
&c. cause of action shown. On the merits a general denial was  
pleaded.

On the trial the plaintiff offered in evidence the proces verbal of the sale by order of the Probate Court, the property of Nettles' estate, to which this property belonged, which was rejected on the ground that there was no evidence that the plaintiff had ever complied with the terms of sale. A bill of exceptions was taken to the opinion of the court.

There was judgment for the defendant and the plaintiff appealed.

There was a motion at this term of the court to dismiss the appeal on various grounds which are stated in the opinion of the court.

*Muse*, for the plaintiff, insisted on the reversal of the judgment. The evidence offered and rejected was admissible, and should have been received. 2 *Martin*, N. S., 13; 6 *idem*, 419, 693, 432.

2. The judgment at all events should have been one of nonsuit, instead of being absolutely for the defendant.

*Andrews*, for the defendant.

*Martin, J.* delivered the opinion of the court.

This is an action in which the plaintiff sues to recover a town lot, which he alleges was adjudicated to him, at the Probate sale of the estate of Josiah Nettles, deceased, in 1835, for the price of one hundred and fifty-six dollars; that the widow of the deceased and the present defendant, who is the tutor of the minor heirs, and administering said estate, have refused to give him possession of said lot, or make a conveyance, by reason

of which he has sustained damages to the amount of two hundred and fifty dollars. He prays for judgment decreeing him the lot and for his damages.

The defendant excepted, on the ground that the plaintiff had showed no cause of action, as he had not alleged that he (defendant) was in possession of the lot. In answer to the merits the general issue was pleaded.

There was a verdict and judgment for the defendant and the plaintiff appealed.

The dismissal of the appeal is prayed for on several grounds:

1. That the matter in dispute is not shown to exceed three hundred dollars.

2. The appeal was not made returnable to the next term.

3. There is no legal citation.

4. The judge of the eighth district had no power to grant an appeal from a judgment rendered by the judge of the third district.

I. It has been shown by affidavit that the value of the thing claimed or matter in dispute exceeds three hundred dollars, which gives jurisdiction.

It may be shown by affidavit in this court that the matter in dispute exceeds 300 dollars, and gives jurisdiction.

II. The appeal was granted the 10th April, 1838, and made returnable on the first Monday of June following. The act of the 20th March, 1839, section 19, forbids the dismissal of appeals on the ground that they were not made returnable to the *next term*, when it does not appear that the fault or neglect was imputable to the appellant. Such imputation is not shown here. The appellee has suffered more than two years to elapse since the appeal has been filed, without making objection and praying for its dismissal. It is not very clear that the prohibition to dismiss appeals like the present, being merely remedial, may not be invoked in cases of appeals obtained before the prohibitory act passed; especially when the appellee has suffered several terms to elapse after the passage of the law, without praying the dismissal of the appeal.

The act of March 20, 1839, sec. 19, forbids the dismissal of appeals on the ground of not being returnable to the *next term*, when it does not appear the fault or neglect is imputable to the appellant.

The judge in granting the appeal exercises his discretion in

EASTERN DIS.  
March, 1841.

PERKINS  
vs.  
NETTLES'  
ADMINISTRATOR  
&c.

EASTERN Dis.  
March, 1841.

PERKINS  
vs.  
NETTLES'  
ADMINISTRATOR  
&c.

making it returnable to the next or succeeding term. It is true the appeal might have been made returnable to the third or fourth Monday in May, as within that time service might have been made, if no accident had prevented it, but we do not believe the judge erred in allowing a delay until the first Monday in June.

III. The citation is a little out of the ordinary form, and contains some useless matter; but it appears to us fully sufficient. The appellee is cited to be and appear in court on the return day of the appeal.

IV. The judge of the third and eighth districts were required by law at the time of granting this appeal, to *alternate*; and either of them possessed the power to grant appeals from judgments rendered by the other.

The motion to dismiss the appeal is therefore overruled.

In relation to the merits, our attention is arrested by a bill of exceptions taken by the plaintiff and appellant, to the refusal of the judge *a quo* to admit in evidence a copy of the proces verbal of the sale and inventory of the estate of Josiah Nettles, deceased, made by order of the Court of Probates, under which he claims the lot in question, as part of said estate. The court was of opinion that the documents were inadmissible because there was no evidence that the plaintiff had ever complied with the terms of sale.

This court has often said that parties ought not to be controlled in the order in which they choose to introduce the different parts of the evidence necessary in the support of their claims.

The defendant having pleaded the general issue, the plaintiff was called on to establish every allegation in his petition, the first of which is his purchase of the lot he claims. Of this the best legal evidence was the proces verbal: and until the sale was proved it was perfectly useless to proceed to the proof of any other allegation. Indeed the evidence of his compliance with the conditions of the sale required him first to show

When judges are required by law to *alternate* in holding courts in their districts either may grant an appeal from the judgment of the other.

Parties are not to be controlled in the order or manner of introducing the different parts of the evidence of their case.

So the plaintiff may first be allowed to produce the proces verbal of sale under which he claims in evidence, before showing that he has complied with the terms of said sale.

what these conditions were ; and of this the documents of-  
 Eastern Dis.  
 March, 1841.

It is therefore ordered, adjudged and decreed, that the judg-  
 ment of the District Court be annulled, avoided and reversed ;  
 the verdict set aside, and the case remanded for new proceed-  
 ings, with directions to the judge *a quo* to admit the proces  
 verbal of sale and the inventory in evidence. The defendant  
 and appellee paying the costs of the appeal.

LOPEZ ET AL.  
 vs.  
 BERGEL, F. W. C.

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**LOPEZ ET AL, vs. BERGEL, f. w. c.**

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF  
 EAST BATON ROUGE, THE JUDGE THEREOF PRESIDING.

Where the evidence shows the conveyance of a house and lot was made in fraud  
 of creditors by the debtor, to a third person for an alleged price, the sale will  
 be avoided.

Damages for a frivolous appeal will not be allowed, when the matter in dispute  
 is not for a *sum of money*, as the rescission of the sale of a house and lot and  
 its value is not shown.

This is an action for the rescission of the sale of a house and  
 lot in the town of Baton Rouge, which the plaintiffs allege was  
 made to the defendant, a free woman of colour, by their debtor,  
 in fraud of their rights as creditors. They show a judgment  
 against their debtor for upwards of five hundred dollars and  
 expressly charge that he conveyed the house and lot in ques-  
 tion to the defendant to secure it from the payment of their just  
 demand. They pray that the sale be rescinded and annulled,  
 and the property made liable to their judgment.

The defendant resisted the suit on the ground that the sale  
 was *bona fide* and made for a good and valuable consideration.  
 There have been several trials and two or three verdicts for the

EASTERN Dis. defendant. The case has been several times before this court, March, 1841. and always remanded. See 12 La. Rep., 197; 15 idem.

LOPEZ ET AL.

vs.

BERGEL, F. W. C. submitted to a jury, and from all the evidence adduced they returned a verdict for the plaintiffs; and the court being satisfied therewith, rendered judgment avoiding and annulling said sale, so far as it regarded the plaintiffs, and that the house and lot be subjected to the payment of the plaintiff's demand. The defendant appealed.

*R. N. & A. N. Ogden*, for plaintiffs.

*Elam*, for the defendant.

*Bullard, J.* delivered the opinion of the court.

This case has been several times before this court, and remanded for a new trial. The result of the last trial was a verdict for the plaintiffs, which being followed by the judgment, the defendant appealed. 12 La. Rep. 197.

Where the evidence shows the conveyance of a house and lot was made in fraud of creditors by the debtor, to a third person for an alleged price, the sale will be avoided.

The evidence, in our opinion, fully sustains the verdict and shows that the conveyance of the house and lot to the defendant was made in fraud of creditors, and the court correctly applied the law as laid down in articles 1965 and 1972.

Damages for a frivolous appeal will not be allowed, when the matter in dispute is not for a sum of money, as a rescission of the sale of a house and lot and its value is not shown.

The appellee asks an affirmance of the judgment with damages for a frivolous appeal. The article 907 of the Code of Practice authorizes this court to condemn the appellant to pay such damages as it may think equivalent to the loss which he has sustained by the delay consequent on the appeal, "provided the amount of such damages shall not exceed ten per cent. on the value of the *amount* in dispute." In cases in which the appellant has been condemned to pay a sum of money, there is a known standard by which the damages may be ascertained. But in the present case the defendant is not the debtor of the plaintiffs. The matter in dispute is a house and lot in Baton Rouge, which she has been condemned to surrender in order to satisfy a judgment recovered against the defendant's vendor.

The value of the house and lot, which constitutes the amount in dispute, is not shown, and it does not appear whether it exceeds or falls short of the amount of the judgment against Bergel.

EASTERN Dis.  
March, 1841.

DAVIS  
vs.  
DAVIS'S SYNDIC

It is therefore ordered and decreed that the judgment of the District Court be affirmed with costs.

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**DAVIS vs. DAVIS'S Syndic.**

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF  
WEST FELICIANA.

The plea of payment relates particularly to transactions between plaintiff and defendant, and exclusively to sums paid by the latter in discharge or in part payment of the plaintiff's demand.

Under the plea of the general issue, the defendant has a right to show that the plaintiff has *no claim, or a less one* than he sets up; or show money legally expended for the plaintiff's maintainance or education he being a minor; and in general every payment may be proved, made to any other person, except the plaintiff, which tends to lessen or destroy his demand.

When new evidence on which a new trial is based, is discovered while one of the party's witnesses is under examination, he should immediately move for a continuance, allowing time to procure the newly sought evidence.

This is an action against the syndic of the insolvent succession of Green B. Davis, deceased, to recover the sum of \$1,986, which he alleges was received from the estate of his father by the insolvent, while acting as his tutor and administrator of said estate. He alleges that he is the son and sole heir of his late father Gideon Davis, and that G. B. Davis was appointed his tutor in 1824, and while acting as such, caused the estate of his father to be sold at Probate sale and received the proceeds, the nett amount of which is \$1,986, that Green B. Davis died in 1834, insolvent, and he has de-



EASTERN DIS. mandated the amount of his claim from the syndic which the  
March, 1841. latter refuses. He prays that the syndic be required to ac-

DAVIS  
VS.  
DAVIS'S SYNDIC. gage creditor for the amount of his claim; and that it be paid  
accordingly. The syndic pleaded a general denial; and  
denied the heirship of the plaintiff.

On the trial, the plaintiff made proof of his demand, and  
of his heirship and inheritance of his father's estate.

The defendant offered evidence to show that a claim of \$400  
had been allowed as a debt against the estate of Gideon Davis,  
deceased, by the insolvent and paid as such, which was ob-  
jected to but received.

Other evidence touching the insolvency of Gideon Davis's  
estate was produced under objections and exceptions.

The Judge of Probates however, allowed the entire amount  
of the plaintiff's demand, after deducting the sum of \$400,  
paid on account of demands on the estate of Gideon Davis.  
The defendant appealed.

*Thomas*, for the plaintiff.

*Lobdell*, contra.

*Simon J.* delivered the opinion of the court.

The plaintiff alleges that the defendant, who is the syndic  
of the insolvent estate of Green B. Davis, deceased, refuses  
to place him on the tableau of distribution, as a creditor of said  
estate for the sum of \$1,956 and interest. He states that G.  
B. Davis was his tutor, that the said sum is the amount of a  
sale of the property of his, plaintiff's, deceased father, ac-  
cording to the protès verbal of sale made by the court of  
probates; and that the deceased (G. B. Davis,) had failed to  
render any account of his administration of the plaintiff's  
estate.

Defendant answered by denying plaintiff's heirship, plead-  
ing the general issue, and further averring that he had filed a

tableau of distribution, &c. &c. The court of probates rendered judgment in favor of the plaintiff for \$1,586 with interest, and after having unsuccessfully attempted to obtain a new trial, defendant appealed.

EASTERN DIS.  
March, 1841.

DAVIS  
vs.  
DAVIS'S SYNDIC!

The appellee has prayed in his answer that the judgment appealed from be so amended as to allow him the whole amount proven to have come into the hands of his tutor; and he has accordingly called our attention to a bill of exceptions taken to the opinion of the Judge *a quo*, permitting the defendant to prove that a payment of \$400 had been made by the deceased to a creditor of plaintiff's father. This evidence was objected to on the ground that under the plea of the general issue, no such proof could be legally admitted, payment being required to be specially pleaded.

We think the Probate Judge did not err. The general rule certainly is that no evidence can be adduced to prove payment, unless such payment has been specially pleaded; and if the defendant had already paid to the plaintiff the whole or any part of the sum claimed, the plea of payment would have been necessary to enable him to avail himself of such defense; and it is clear that the plea of the general issue would not be sufficient, for that plea denies the total or partial existence of the debt, whilst on the contrary, the plea of payment admits it, at least in part. 6 *La. Rep.* 455, 9 *Idem* 108.

But in this case, the plaintiff sues for the whole amount of the sale of his father's estate, and his claim is denied by the plea of the general issue: we see no reason why the defendant should not be permitted to show that the plaintiff had no claim, by proving that the debts of the father exceeded the proceeds of the sale, without the necessity of pleading payment. Such plea relates particularly to the transactions had between the plaintiff and defendant in relation to the amount of the debt sued for, and exclusively to sums paid by defendant to plaintiff in discharge or part payment of his demand.

The plea of payment relates particularly to transactions between plaintiff and defendant, and exclusively to sums paid by the latter in discharge or in part payment of the plaintiff's demand.

EASTERN DIS.  
March, 1841.

DAVIS  
vs.  
DAVIS'S SYNDIC.

By the *Code of Practice*, art. 998, minors are authorized to institute suits in the court of probates to recover the sums which they suppose to be due by their tutors. This is what the plaintiff has done. He could have no claim beyond the net proceeds of his father's estate, after the payment of the

Under the plea of the general issue, the defendant has a right to show that the plaintiff has no claim, or a less one than he sets up; or show money legally expended for the plaintiff's maintenance or education, he being a minor; and in general every payment may be proved, made to any other person, except the plaintiff, which tends to lessen or destroy his demand.

debts of the latter. And we are of opinion that under the plea of the general issue, the defendant had a right to show that the plaintiff had no claim at all, or a lesser one than that set up. Under the same plea he might have shown money legally expended for the maintenance and education of the plaintiff, and in general every payment to any other person but the plaintiff, which tended to destroy or lessen his liability as averred by the plaintiff.

There is no necessity for our examining the next bill of exceptions found in the record, as the evidence admitted by the court did not avail the defendant.

But the appellant has directed our attention to the application by him made to the court below for a new trial on the ground of newly discovered evidence since the trial of the cause, and which, as he swears in his affidavit, he could not with due diligence have obtained before.

It appears from what has been intimated and even asserted in argument and not denied, that the existence of the evidence alluded to in the motion for a new trial, was discovered during the progress of the trial, and whilst one of the defendant's witnesses was under examination. Under such circumstances, we are not ready to say that, if the defendant had arrested the trial, by moving the court for a continuance of the cause, until he could procure the testimony of the witnesses able to prove the material facts newly discovered, such continuance, which is always within the discretionary power of the court, should not

When new evidence on which a new trial is based, is discovered while one of the party's witnesses is under examination, he should immediately move for a continuance, allowing time to procure the newly sought evidence.

have been granted, *C. of Pr.*, art. 468; and that if it had been improperly refused, he would not have obtained relief at our hands. But the defendant, although in possession of sufficient information on the existence of evidence, which he afterwards

swore to be material and important, permitted the trial to proceed, and thus, in our opinion, has precluded himself from claiming the benefit of it on a motion for a new trial. It is perfectly clear that, in the words of the article 561 of the Code of Practice, the evidence was not discovered *since the judgment was rendered*, and that the defendant, far from showing that he had used every effort and diligence in his power to procure the testimony *before judgment*, thought he could do without it, and made no attempt whatever to obtain it.

On the whole, we think the judgment of the lower court is correct; credit was allowed to the defendant for \$400, as being the amount of a debt proven to have been due and paid to one of the witnesses; and although it has been shown that the purchases made by this creditor at the sale of the property of the estate of plaintiff's father, amounted to \$646, there is no evidence that any more than \$400 was applied to the satisfaction of the debt.

It is therefore ordered, adjudged and decreed that the judgment of the Probate Court be affirmed with costs.

SMITH  
vs.  
BRADFORD!

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SMITH vs. BRADFORD.

APPEAL FROM THE COURT OF THE THIRD DISTRICT FOR THE PARISH OF EAST  
FELICIANA, THE JUDGE OF THE DISTRICT PRESIDING

Attorney's fees are sometimes allowed as special damages on the dissolution of an injunction wrongfully sued out, as a punishment for the unjustifiable resort to this as a means of delay to defeat the ends of justice.

But where an injunction is maintained against hypothecary or executory proceedings on account of a defect in the affidavit and other parts of the proceedings, special damages or lawyer's fees will not be allowed.

This is an injunction case. The plaintiff obtained an injunc-

**EASTERN** Dis. tion to restrain an order of seizure and sale which the defend-  
March, 1841. dant, Bradford, had taken out and was prosecuting on his

**SMITH**  
**VS.**  
**BRADFORD.**

mortgage and vendor's privilege. The plaintiff alleges that the defendant failed to make the necessary legal demand of him as third possessor, and to take the oath required before resorting to the hypothecary action against mortgaged property in his hands as a third possessor. That under these illegal proceedings the sheriff seized and removed the negroes who were engaged in the cultivation of his plantation, in violation of the 660th article of the Code of Practice, thereby causing him great damage. He alleges there is no affidavit that the debt for which the seizure is made is due; or that it was demanded from the original debtor thirty days before coming upon him as third possessor; wherefore he prays that the defendant, Bradford, and the sheriff be perpetually enjoined from any further proceedings upon said order of seizure and that he have judgment for \$5000 in damages.

Bradford answered separately; admitted the seizure and justified his course in the proceedings he had instituted; and averred that the injunction was wrongfully sued out, occasioning him much damage. He prayed that it be dissolved with damages and costs; besides \$500 special damages.

Robbins, the sheriff, answered separately, and has been relieved in part. See 14 La. Rep., 281.

The District Judge on hearing the evidence, decided that the executory proceedings instituted by the defendant, Bradford, had been changed into an hypothecary action, and carried on illegally, by which the defendant therein (now plaintiff in injunction) had been much harrassed and damaged. Judgment was rendered perpetuating the injunction, and for 500 dollars special damages against the defendant; being the expense of counsel fees in instituting and carrying on the present case. The defendant appealed.

*Andrews*, for the plaintiff, insisted the judgment was correct. The plaintiff was damaged by the wrongful and illegal

proceedings of defendant: and he who causes damage to another is bound to indemnify the person suffering or injured.

EASTERN DIS.  
March, 1841.

SMITH  
VS.  
BRADFORD.

2. There can be no difference between the cases in which an individual illegally sues out an injunction, and where by his illegal proceedings he compels his adversary to resort to one for protection. In the first case it has been decided that attorney's fees may make part of the damages sustained, and there is no reason why they should not be allowed in the latter. The loss and damage to the party is the same. La. Code, 2294; 2 La. Rep., 102; 5 idem, 246; 13 idem, 90.

The appellant joined issue on a claim for damages, and set up a demand in reconvention for damages and injuries done him, and suffered proof to be offered against him without objection and introduced evidence himself. It is now too late for him to complain.

*Muse*, for defendant and appellant:

1. In this case, the plaintiff relies for a reversal of the judgment herein appealed from, upon the following ground, viz: That there is *no law or authority* to compel him to pay the *lawyer's fee* of his successful adversary, *as special damages*, in a case like the present—nor any other “expense of the suit,” but the costs of court. No law or authority having been cited or “referred” to by the Judge *à quo*. Neither does the *justice* of the case authorize such a decree. 8 La. Rep., 33; *Keene vs. Lizardi et al.*

2. The laws and decisions of this honorable court relative to *injunctions* wrongfully obtained to restrain the execution of judgments, *having*, as is humbly conceived, no sort of application to an *executory process informally* or “improvidently” issued.

*Morphy, J.* delivered the opinion of the court.

The plaintiff, a third possessor of mortgaged property, enjoined executory proceedings instituted by defendant, and at the same time claimed damages against him, and against the



**EASTERN DIS.** sheriff, Robbins, who had made the seizure. The injunction was  
*March, 1841.* made perpetual and both defendants decreed to pay damages.

**SMITH**  
**VS.**  
**BRADFORD.**

Robbins took up an appeal which was decided in January term, 1840. Bradford, the other defendant, now prosecutes this his separate appeal from said judgment.

We have considered a motion made to dismiss this appeal, but find nothing in it that should prevent us from examining the merits of the case. The sole ground of complaint in this court is that defendant was decreed to pay the plaintiff whose injunction was maintained the fees of his lawyer, amounting to \$500, as special damages. We are of opinion that in this the court below erred; it is true that when an injunction is dissolved, the lawyer's fees of the party against whom it has wrongfully issued have several times been allowed as special damages, under the act of 1831. This was thought necessary to carry out the intention of the lawgiver, whose avowed object was to punish with heavy damages the too frequent and unjustifiable resort to a proceeding which had become the daily means of delaying and sometimes defeating the ends of justice; but because such a decision was made, it by no means follows that when an injunction is maintained, damages of this description are to be allowed to the plaintiff in injunction. Were we, in this instance, to give such damages on account of the supposed analogy between the two cases, we see no reason why we should not be called upon hereafter to allow them in every case; for the party enjoining the execution of an order of seizure and sale might be viewed as standing in the position of an ordinary defendant. After a while the lawyer's fees of every successful defendant would be claimed as a matter of course, and would become a part of the costs to be paid in every suit. This, we believe, would be contrary not only to law but to sound policy and justice; it would be closing the doors of our courts on a large class of suitors, who would not dare to assert their just rights lest they should expose themselves to a heavy penalty, in case they should not be able to

Attorney's fees are sometimes allowed as special damages on the dissolution of an injunction wrongfully sued out, as a punishment for the unjustifiable resort to this as a means of delay to defeat the ends of justice.

support their demands by sufficient evidence ; or should fail to succeed through some mistake or error on the part of their counsel, as has happened in the very case under consideration. Plaintiff's injunction was maintained on the ground that the defendant had failed to make the affidavit required by law in all hypothecary actions in relation to the preliminary demand to be made of his debtor. The taxed costs formerly allowed to the attorney of the successful party having been repealed, we know of no law sanctioning the allowance of any thing beyond the ordinary costs of court to be paid by the party cast.

It is therefore ordered that the judgment of the District Court be reversed, and proceeding to give such judgment as in our opinion should have been rendered below : it is further ordered that the injunction be rendered perpetual, and that defendant pay the costs of the court below ; those of this appeal to be paid by the plaintiff and appellee.

EASTERN DIS.  
March, 1841.

HARALSON  
vs.  
CAMP ET AL.

But where an injunction is maintained against hypothecary or executory proceedings on account of a defect in the affidavit and other parts of the proceedings, special damages or lawyer's fees will not be allowed.

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### HARALSON vs. CAMP ET AL.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF WEST  
FELICIANA, THE JUDGE THEREOF PRESIDING.

In a suit for professional services as an attorney at law, when no other services were rendered than aiding to draw a petition in a suit which was afterwards abandoned; the verdict of a jury disallowing the plaintiff's demand was not disturbed.

This is an action for professional services as attorney and counsellor at law. The plaintiff alleges he was employed with another lawyer to institute suit in the Probate Court of Pointe Coupée, to compel a tutrix to render an account, and to annul certain Probate proceedings and recover for the plaintiffs therein (present defendants) a plantation and about forty slaves ; that the

**EASTERN DIS.** petition was filed and he was at much trouble to investigate  
**March, 1841.** the law and facts of the case. He states there was no sum  
**HARALSON** stipulated or agreed upon, but he alleges his services were  
**VS.** worth \$500, for which he prays judgment.  
**CAMP ET AL.**

The defendants admitted they employed the plaintiff, but that he wholly failed in the suit; that he neglected to attend to it; whereby they were compelled to abandon it, from his non-attendance and neglect. They reconvene for damages.

The cause was finally submitted to a jury on a mass of testimony, who returned a verdict for the defendants. From judgment confirming the verdict, after an unsuccessful attempt to procure a new trial, the plaintiff appealed.

*Stevens*, for plaintiff.

*Lyons*, contra.

*Bullard, J.* delivered the opinion of the court.

This is an action by an attorney and counsellor at law to recover the value of his professional services on a proceeding in the Court of Probates for the parish of Pointe Coupée. No other services are shown except in aiding to draw a petition. The suit was ultimately abandoned by the plaintiffs, who are the defendants in this case. The questions whether it was the fault of the plaintiff that the suit was not prosecuted, and what was the value of the plaintiff's services, were left to the jury, who found a verdict for the defendants, and the judge overruled a motion for a new trial.

In a suit for professional services as an attorney at law, when no other services were rendered than aiding to draw a petition, in a suit which was afterwards abandoned; the verdict of a jury disallowing the plaintiff's demand was not disturbed.

A careful examination of the evidence has not satisfied us that it is our duty to disturb the verdict.

The judgment of the District Court is therefore affirmed with costs.

**ORLEANS NAVIGATION CO. vs. MUNICIPALITY No. 2.**EASTERN DIS.  
March, 1841.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

ORLEANS  
NAVIGATION CO.  
VS.  
MUNICIPALITY  
NO. 2.

Where the plaintiffs take nothing by their suit, the defendants should be allowed all their costs.

When the injury complained of is damage done to the plaintiff's works, and the matters in contest are the actual damages or injury done and sustained, the court will not inquire into the plaintiffs' titles or chartered rights to make the public works in question.

This suit commenced by injunction. The plaintiffs allege they have power and authority conferred on them by the laws of the late Orleans Territory; and an act of Congress passed the 3d. March, 1807, to dig and make a Canal from Lake Pontchartrain to the Mississippi River. That in 1837, they resolved to continue the construction of this canal, from the Basin at Canal Carondelet, extending through Basin and Canal streets to the river, and actually commenced digging and excavating said canal in the middle of Canal street, near the river, when the Municipality No. 2 sent a body of men and by force of arms drove petitioners' agents and workmen away; prevented them from prosecuting said work, and filled up the canal or excavations to a considerable extent; injuring and causing damages to their work. That the officers who directed this force are liable, together with the defendants for the trespass. They pray that the defendants and their officers or agents be perpetually enjoined from molesting and hindering them in prosecuting their works; that their authority and right to make their canal through the middle of Canal street be recognized and decreed; and that they have judgment for their damages and costs.

The defendants pleaded a general denial, and expressly averred that the space of ground running through the middle of Canal street is and has been for more than 30 years, in the exclusive possession and enjoyment of the late Mayor, Aldermen and inhabitants of the City of New-Orleans, and of the public generally, first as part of the commons and now as a

**EASTERN DIS.**  
**March, 1841.**

**ORLEANS**  
**NAVIGATION CO.**  
**vs.**  
**MUNICIPALITY**  
**NO. 2.**

public street; and the plaintiffs having always acquiesced in said enjoyment, have thereby lost any rights they might ever have had to the same. That the defendants have succeeded by the division of the city to its right of regulating the police of so much of said highway or street, as lies within their limits; and the plaintiffs having illegally taken possession and caused a large hole, or trench or ditch to be dug therein, which they abandoned, and which was filled with stagnant water, injuring and endangering the health of the inhabitants in its neighborhood, they were notified to fill it up, and on failing or refusing the defendants caused it to be filled up; and that this expense and the illegal acts of the plaintiffs caused them damage to the amount of 500 dollars, for which they pray judgment in reconvention; and for general relief.

Upon these issues the case was tried. The plaintiffs produced in evidence all their titles, charters, grants, &c., showing their rights and privileges to make the work in question. It appeared that after digging a large ditch in the middle of Canal street, near the river, the plaintiffs suspended their work, upon which the ditch filled with water, and in the month of June on the return of warm weather, the Municipality notified them to fill it up, as it had become a nuisance. Upon refusal, the Municipality sent its officers with a sufficient force and filled it up at the plaintiff's expense.

The Parish Judge was of opinion, upon summing up the case, that the evidence was not sufficient to establish on either side, the damages claimed; and gave judgment dismissing the suit, each party paying their own costs. The defendants appealed. The plaintiffs prayed an amendment of the judgment in their favor.

*Hennen*, for the plaintiffs.

*Carter*, for the defendants.

*Martin J.* delivered the opinion of the court.

The plaintiffs in this suit allege that they are owners of a strip of land in the middle of Canal street in the City of New Orleans, conveyed to them by the Mayor, Aldermen, and inhabitants of said City, in pursuance of an act of Congress, for the purpose of digging a Canal, connecting the navigation of Lake Pontchartrain with that of the River Mississippi. That they lately began to dig and excavate the Canal, and after having progressed therein they were obstructed and prevented by some of the inhabitants; and afterwards the defendants caused the excavations they had made to be filled up and levelled with the ground, to their great injury and damage. They pray for damages and that their title to this strip of land may be recognized, and the defendants for ever enjoined from disturbing them in the possession and use thereof.

The defendants pleaded the general issue; and aver that the premises have for upwards of thirty years been in the exclusive possession and enjoyment of the Mayor, Aldermen and inhabitants of the City of New-Orleans, first as part of the commons of said City, and now forming a part of one of the public streets; that the premises being within the jurisdiction of the defendants; and the plaintiffs having made a large and deep excavation, which they afterwards abandoned, and left filled with stagnated water, that during the hot season became a great nuisance, they were ordered by the defendants to have it filled up: And on their neglect and refusal, this was effected by the defendants. They pray that they may be allowed the expenses incurred therein, which they claim in reconvention.

The Parish Court dismissed both parties and ordered that each should pay his own costs. The defendants appealed.

The plaintiffs and appellees have prayed the amendment of the judgment, so that this court may decree to them their title to the premises; and that the defendants be enjoined from disturbing them in the possession and use thereof.

The defendants can have no other ground of complaint than the refusal of the court to give them judgment for the damages

*EASTERN DIS.  
March, 1841.*

ORLEANS  
NAVIGATION CO.  
VS.  
MUNICIPALITY  
NO. 2.



EASTERN Dis. occasioned by the wrongful acts of the plaintiffs and their March, 1841.

ORLEANS  
NAVIGATION CO.  
vs.  
MUNICIPALITY  
No. 2.

costs.

Where the plaintiffs take nothing by their suit, the defendants should be allowed all their costs.

The record does not contain any evidence as to the extent of the damages claimed; the court therefore properly refused to allow any. The dismissal of the petition entitled the defendants to their costs. The court in our opinion erred in not allowing them. Costs are always to be paid by the party cast. The only exceptions to this rule, are perhaps, *that* stated in the Code of Practice, article 370, and when there is no amicable demand.

The plaintiffs have not stated in their petition any fact which authorizes them to ask that the title claimed by them to the premises be recognized; and that the defendants be prohibited from disturbing them, except the filling up the excavations which they had made and left, by the order of the defendants, after they (the plaintiffs) had been notified and required to fill them up. The order given for filling up the excavation is not stated as a measure in opposition to the plaintiffs title, and the right which they claim to make a Canal. The answer and evidence show on the part of the defendants, that it was a regulation of the police calculated to prevent an injury to the health and inhabitants, resulting from an accumulation of stagnant water, in consequence of the plaintiffs having abandoned the work which they had begun.

When the injury complained of is damage done to the plaintiffs works, and the matters in contest are the actual damages or injury done and sustained, the court will not inquire into the plaintiff's titles or chartered rights to make the public works in question.

The answer avers that the premises have been for upwards of thirty years in the exclusive possession and enjoyment of the inhabitants of the City, and now forms a part of one of its principal streets. This is literally true; but the alleged possession and enjoyment stated to have heretofore existed, is not inconsistent with the right which the plaintiffs claim to dig a Canal; for the conveyance of the premises to the plaintiffs, is expressly made for this purpose; and the defendants contend that the possession and enjoyment of them cannot be disturbed by any other means, than those which are intended to carry into effect the object of the conveyance.

It does not appear to us that the Parish Court erred in refusing to recognize the plaintiffs' title and perpetuate the injunction which had been granted. The amendment of the judgment asked for by the appellees cannot therefore be allowed.

*EASTERN DIS.  
March, 1841.*

**RANDALL  
VS.  
BANK OF  
LOUISIANA.**

It is ordered, adjudged and decreed that the judgment of the Parish Court be annulled, avoided and reversed; and ours be, that the petition of the plaintiffs be dismissed; and that the rights of the defendants to damages on their plea of re-convention be reserved; the plaintiffs and appellees paying costs in both courts.

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**RANDALL vs. BANK OF LOUISIANA.**

**APPEAL FROM THE COURT OF THE THIRD DISTRICT FOR THE PARISH OF WEST  
FELICIANA, THE JUDGE OF THE DISTRICT PRESIDING.**

A judgment not rendered between the same parties cannot form the plea of res judicata.

Objections that a private act of transfer of a judgment, to the plaintiff's attorney in fact has no date against third persons, and that there is a discrepancy in the names of the transferee, go to the effect and not to its admissibility in evidence; especially when the variance is explained.

A recital in a deed or act of mortgage cannot produce any effect to the prejudice of a person not a party to it, and who does not claim under it; and such recital is not evidence against a stranger to the second deed.

Third persons cannot contest the validity of a sale and transfer of a judgment between others, as being simulated. It is only the heir or creditor of the owner whose rights or interest may have been affected or prejudiced by the transfer, who can complain.

The seizing creditor is entitled to the revenues of the property whilst under seizure from the time the seizure was made until sold.

This case commenced by injunction. The plaintiff sues by

**EASTERN DIS.** his agent Joseph R. Thomas, and shows that he is the trans-  
March, 1841. ferree and owner of a judgment, recovered the 27th January,  
**RANDALL** 1825, by C. McMicken as curator of the estate of Taliaferro  
**VS.** 1825, by C. McMicken as curator of the estate of Taliaferro  
**BANK OF** Reno, deceased, against Edmund Monroe and others, for the  
**LOUISIANA.** sum of \$3,773, which was duly recorded in the Parish Judge's  
 office, the 8th February following. That on the 4th January,  
 1828, an execution issued on said judgment and was levied on  
 3 lots of ground in St. Francisville, and the sale enjoined by  
 E. Monroe on the 4th February following. That the matter  
 remained in this situation until the 10th May, 1832, when the  
 injunction was dissolved.

The plaintiff further shows that on the 9th April, 1828, McMicken as curator, sold at Probate sale all the property of Reno's estate, including this judgment, which was purchased by Samuel A. Atchison for \$1,740; and that on the 14th May, 1828, Atchison transferred the judgment to him (petitioner) by private act, through Robert J. Nelson, petitioner's agent and attorney in fact, for a valuable consideration, thereby giving him the right to demand and receive the amount thereof in his own right.

The plaintiff further states that on the 30th April, 1827, E. Monroe, one of the debtors in said judgment, executed a mortgage on this same property to the Bank of Louisiana, to secure the payment of \$1,000; and on which the defendants have obtained an order of seizure and sale, and are proceeding to sell the same on the 20th February, 1837, to the manifest injury of this petitioner; wherefore he prays for an injunction restraining and perpetually enjoining said sale; that the revenues of the property be taken into possession by the sheriff until the further order of court; and for general relief.

The defendants first pleaded the exception of *res judicata* that all the matters now in contest, have already been decided in a suit between Charles McMicken, curator, &c., against Edmund Monroe and others, about the same property; in

which said McMicken's appeal was dismissed; judgment having been rendered against him.

EASTERN DIS.  
March, 1841.

The defendants pleaded a general denial, and denied specially the identity of the plaintiff and consequently the right of his attorney in fact to sue. They admit the rendition of the judgment under which the plaintiff claims; they set up their mortgage and confession of judgment from Monroe which they allege was given more fully to invest them with security for the payment of the sum of \$1,000, and its interest, and he (Monroe) caused to be transferred to them a note for this sum signed by him, payable to the order of one Andrew Skillman, dated the 17th November, 1825, payable the first day of August, 1827; and also caused to be assigned by public act, the mortgage which he, Monroe, gave Skillman to secure payment of said note and other notes given him for the price of said property, &c.; which assignments invested them with the original vendor's privilege of said Skillman on the property and is superior to every other privilege on the same. They finally aver they have sustained damages by reason of said injunction in the sum of 250 dollars, which they claim and pray that the plaintiff's petition be dismissed.

RANDALL  
vs.  
BANK OF  
LOUISIANA.

Upon these pleadings and issues the cause was tried.

The main contest was about the two mortgages; *that* resulting from the recording the plaintiff's judgment the 8th February, 1825, and the one given by Monroe to Skillman, dated the 17th November, 1825, to secure the payment of his note of 1000 dollars, payable to and endorsed by the latter and transferred to the defendants.

The District Judge who tried the cause summed up the whole matter in considering plaintiff's mortgage valid and binding, from the time of recording it; that Skillman had no vendor's privilege upon the lots in question; and that Monroe's mortgage to Skillman was dated 9 months after the recording of plaintiff's; that the Bank became subrogated to the rights of Skillman on the 30th April, 1827; but there

EASTERN DIS. was no evidence to show Skillman ever owned this property,  
March, 1841. he was only mortgagee. That the plaintiff's mortgage was

RANDALL  
VS.  
BANK OF  
LOUISIANA

of an older date than defendant's; consequently must hold the property. There was judgment perpetuating the injunction and decreeing the sheriff to pay over the proceeds and revenues of said property to the plaintiff, in satisfaction of his said judgment. The defendants appealed.

*Thomas & Turner*, for the plaintiff.

*Lobdell*, contra.

*Simon, J.* delivered the opinion of the court:

Plaintiff states that on the 27th of January, 1825, Charles M'Micken, curator of the estate of Taliaferro Reno, deceased, obtained a judgment against Edmund Monroe and others for the sum of \$3773, with interest; that said judgment was duly recorded on the 8th of February ensuing in the office of the parish judge; that on the 4th of January, 1828, an execution issued against the defendants, which was levied on three lots of ground, situate in the town of St. Francisville, known as No. 1, 2, and part of No. 12, in square No. 10; that the execution having been enjoined by Edmund Monroe, the sale of the lots was stayed until the 10th of May, 1832, when the injunction was dissolved. He further alleges that on the 9th of April, 1828, the aforesaid judgment was, by virtue of an order of the Court of Probates, offered for sale and duly adjudicated to one S. A. Atchison for the sum of \$1740; and that the same was afterwards transferred to the plaintiff by Atchison, by an act under private signature, dated 14th of May, 1828.

He further represents that on the 30th of April, 1827, E. Monroe executed a mortgage with confession of judgment, in favor of the defendants, thereby hypothecating the said three lots to secure the payment of \$1000, &c.; that said defendants are about causing the same to be sold by virtue of an order of seizure and sale by them obtained, and the sale thereof is adver-

tised to take place on the 20th of February, 1837. He also states that the sheriff holds in his possession a certain sum of money proceeding from the revenues or rent of the property seized, out of which he is entitled to payment in preference to subsequent creditors of the defendant in execution. He prays that a writ of injunction issue to prevent the sale of said property, that the revenues be ordered to remain in the hands of the sheriff until further order of the court, and that the seizing creditors be cited to show cause why the injunction should not be perpetuated.

EASTERN DIS.  
March, 1841.  
RANDALL  
VS.  
BANK OF  
LOUISIANA.

Defendants answered by first pleading the exception of *res judicata*, arising from a judgment obtained in their favor against Charles M'Micken in two consolidated suits in which the same matters in controversy were adjudicated upon and finally decided between them and M'Micken. They further deny the reality of such a person as Charles M. Randall; they admit the judgment obtained by M'Micken against E. Monroe and others; and they set up their mortgage on the property seized, averring that it was given to secure the payment of a note of \$1000, dated 17th of November, 1825, transferred and assigned to them by one Skillman, from which assignment they have acquired the original vendor's privilege of said Skillman on the property, which is superior to any other. They pray that the injunction be dissolved and for damages.

The plea of *res judicata* was first disposed of by the lower court and overruled; and after a full investigation of all the matters in controversy, the judge *a quo* perpetuated the injunction, and ordered the proceeds of the sale of the lots in question together with the revenues arising therefrom, which may be or may hereafter come into the hands of the sheriff, to be first applied to the satisfaction of the plaintiff's judicial mortgage; from which judgment the defendants appealed.

This is merely a question of distribution for which there was no necessity to arrest the sale of the property seized by the issuing of an injunction; and had the defendants moved



EASTERN Dis. the court to dissolve the injunction on the face of the petition,  
March, 1841.

RANDALL  
vs.  
BANK OF  
LOUISIANA.

we are not ready to say that the motion should have been overruled; and we concur with the judge *a quo* in the opinion that the legal and proper course which the plaintiff should have pursued, ought to have been to let the sale be proceeded in, and to make opposition to the proceeds thereof being paid by the sheriff to the defendants before satisfying said plaintiff's claim. *C. of Pr., arts. 678, 679, 683, 684, 401, 402, 403.* But the defendants have thought proper to join issue on the matters alleged in the petition, and to go to trial on the respective pleadings of the parties. We shall therefore examine the case on its real merits.

The first question to which our attention is called, is that of *res judicata*. This point presents no difficulty, as the judgment referred to was not rendered *between the same parties* and cannot form the plea of *res judicata*. 6 *Martin, N. S., 290*; 5 *La. Rep., 474*. In the former suit, the contestation was between the curator of Reno's succession and the present defendants; and said curator had clearly no right to prosecute in favor of the succession a claim founded on a judgment which had been sold several years before. The district judge did not err in overruling said plea.

The next arises from a bill of exceptions taken to the opinion of the lower court permitting the introduction in evidence of a certain act under private signature, purporting to be a deed of transfer of the judgment, from Atchison to Robert Nelson as attorney in fact of the plaintiff; the objections were that it had no date against defendants and that Nelson appears to act as the agent of C. McM. Randall and not of C. M. Randall. We think the objections were properly overruled, as they go to the effect and not to the admissibility of the evidence; particularly as the plaintiff offered in the mean time the testimony of a witness to explain the variance.

On the merits, the defendants aver that their mortgage should obtain the preference over that of plaintiff, as being

older and as carrying with it the vendor's privilege: Plaintiff's judgment was recorded on the 8th of February, 1825, and the act of mortgage given to the defendants by Edmund Munroe on the property in dispute, was passed on the 30th of April, 1827, and recorded on the 31st; so that from the dates of the recording of these different mortgages, it appears clear that the plaintiff's judicial mortgage is anterior to the defendant's conventional one.

**RANDALL  
VS.  
BANK OF  
LOUISIANA.**

But it is contended that the act of mortgage given to the Bank recites that *the property mortgaged is the same which E. Monroe had purchased from A. Skillman on the 17th of November, 1825*; and it is insisted that the debt which Monroe contracted towards defendants, is the same which was transferred to them by Skillman, by the assignment of a note of \$1000, secured by a former mortgage; and that in consequence of the said assignment and transfer of the note and mortgage made on the 30th of April, 1827, the defendants have become invested with the original vendor's privilege of Skillman on the property, and is superior to every other privilege or mortgage on the same.

It is proper to remark that the act of mortgage from Monroe to the bank declares that the debt for which the mortgage is given, is contracted *for a loan of money* granted by the corporation to the appearer, and which he acknowledges *to have received*, and this alone would perhaps exclude the idea that the consideration was the same as that contended for by the appellants. But even supposing it to be the same, we think the district judge did not err in rejecting their pretensions. It is true that the note transferred by Skillman to the bank, is dated the 17th of November, 1825, and that the mortgage also transferred, is dated the same day, and recites the property to be *the same which the said Andrew Skillman this day conveyed to Edmund Monroe*; but no act of sale conveying the property in dispute has been introduced in evidence; none is shown to have ever been recorded, and by the *article 3238 of*

**EASTERN DIS.** *the Louisiana Code*, the vendor of an immovable only pre-  
**March, 1841.** serves his privilege on the object sold, when he has caused

**RANDALL**

**VS.**

**BANK OF  
LOUISIANA:**

A recital in a deed or act of mortgage cannot produce any effect to the prejudice of a person not a party to it, and who does not claim under it; and such recital is not evidence against a stranger to the second deed.

his act of sale to be duly recorded, &c. The recital in the first deed of mortgage cannot produce any effect to the prejudice of the plaintiff: it is a well known rule of evidence that "*a recital in a deed will not operate as an estoppel, or as evidence, against one who was neither a party to the deed nor claims under the party*"; and that *such a recital is not evidence against a stranger to the second deed.* 1 *Starkie on Evidence, part 2, section 156, page 369*; 2 *Starkie, part 4, page 31*; *Phillips on Evidence, vol. 1, page 356.* The only rights therefore shown by the appellants, are those which result from the conventional mortgage given on the 30th of April, 1827; and perhaps also, by virtue of the transfer, from that of the 17th of November, 1825; and if so, the bank cannot derive any benefit from them as against the plaintiff; whose judicial mortgage was recorded on the 8th of February, 1825, upwards of nine months previous to the mortgage of Monroe to Skillman. We conclude therefore that the plaintiff's mortgage, being anterior in date, ought to be paid in preference to that of the defendants.

But it is urged by appellants' counsel that the transfer and sale to Atchison, at public auction, by M'Micken as curator of Reno's succession, and from Atchison to Nelson as agent of Randall are simulated, and ought to be declared null and void: 1st. Because the curator had no right to sell the judgment until he had executed it against Monroe et al., or showed there was no property to execute; 2d. Because the curator M'Micken was then privy to the auction sale, and the principal actor in said sale; and was also the actor in the transfer from Atchison to Randall; that no price is fixed in the act of transfer, which is made only *for a valuable consideration*; and 3d. Because M'Micken's testimony shows that the proceedings were carried on without Randall's knowledge and for the advantage of the curator, M'Micken, &c. Admitting all these grounds to be cor-

rect, which however do not form any part of the issues in this suit, EASTERN DIS. March, 1841.

how can the defendants pretend to be benefited thereby? they are third persons to the acts of the curator; they have no right to complain, and cannot contest the title of the plaintiff to the judgment. It is a matter which concerns exclusively the creditors of Reno's succession, or the heirs of the deceased; and if any fraud has been committed by the curator, such fraud does not bear upon the appellants whose situation and rights cannot be changed or in any way bettered by the illegal or fraudulent acts of M'Micken in the administration of the succession. The real and only issue between the parties to this suit, is whether the defendant's mortgage and alleged privilege is to have the preference over the judicial mortgage resulting from the recording of a judgment which apparently belongs to the plaintiff, whose title, in our opinion, cannot be disputed but by those whose rights or interest may have been affected or prejudiced by the transfer; and it is sufficient, as to defendants, that the plaintiff has shown a *prima facie* title. The facts, however, show that the judgment in question was regularly transferred and sold by virtue of an order of the Court of Probates, and adjudicated to Atchison; that the latter transferred it to the plaintiff through R. Nelson, who acted as his agent or *negotiorum gestor*; that said plaintiff has accepted and ratified the act of Nelson by instituting this suit and instructing Joseph R. Thomas, his agent, accordingly; that the signatures of the parties to the act of transfer, are genuine; and that the plaintiff has made out such a title to the judgment as to entitle him to controvert the defendants' pretensions, and to recover its amount contradictorily with them.

The appellee has prayed in his answer that the judgment appealed from be so amended as to allow him the nett proceeds of the revenues of the property, collected by the sheriff, whilst it was under seizure. He is undoubtedly entitled to recover such revenues as may have or may hereafter come into the hands of the sheriff from the time the property was seized; to

RANDALL  
vs.  
BANK OF  
LOUISIANA.

Third persons cannot contest the validity of a sale and transfer of a judgment between others, as being simulated. It is only the heir or creditor of the owner whose rights or interest may have been affected or prejudiced by the transfer who can complain.

The seizing creditor is entitled to the revenues of the property whilst under seizure from the time the seizure was made until sold.

EASTERN Dis.  
March, 1841.

CANTY  
vs.  
BEAL.

be applied, so far as necessary, to the satisfaction of his judicial mortgage; but on referring to the judgment of the lower court, we find that these revenues have been already and correctly allowed. There is, therefore, no need of our interference.

We have entertained a doubt on the propriety of perpetuating the injunction, which perhaps should have been dissolved, so as to let the sheriff proceed with the sale of the property already seized, under the rules pointed out by the Code of Practice; but as the appellants do not complain of this part of the judgment, and as this case being one of old standing, the sale of the property will perhaps more expeditiously be made by the plaintiffs suing out a writ of fieri facias, we are not disposed to disturb the judgment of the lower court.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

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**CANTY vs. BEAL.**

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF  
EAST BATON ROUGE, THE JUDGE THEREOF PRESIDING.

When all the matters in the pleadings are submitted to amicable compounders, that they should pass upon and settle all accounts between the parties, their award, when there has been no fraud, misconduct or extreme partiality, will be made the judgment of the court, without revision or alteration.

This is an action for the settlement and balance on a partnership for carrying on the brick making business. The plaintiff alleges that in April, 1837, he put in six able bodied negroes, a cart and oxen, and the defendant was to furnish five negroes and his own services in carrying on a brick yard;

the profits arising to be on joint account. That these negroes were employed under the management and superintendence of defendant about 7 months, and their services were worth \$216 per month, and the cart and oxen three months, worth \$75. He alleges that defendant instead of employing said hands about the brick yard and in the manner stipulated, he had them at extra work for his own benefit and use, no way connected with the concern, to his damage \$500, besides the value of their services. That had the business been carried on properly and a correct account been rendered of the profits he would have realized \$2,087. That defendant has refused and neglected to render an account. He prays that defendant be required to render a correct account of the partnership concerns and of the profits arising therefrom; and pay for three months extra work of his slaves at \$216 per month; that he have judgment for \$1,587, the value of the services of the slaves and cart, and \$500 in damages.

EASTERN DIS.  
March, 1841.

CANTY  
VS.  
BEAL

The defendant pleaded a general denial; admits the partnership but averred that the plaintiff failed to comply with his part of the contract, or agreement. He sets out the various matters involved; admits the concern made \$1,493, but when the expenses, his services, and various other charges, &c., are deducted, the plaintiff stands indebted to him in the sum of \$312; according to an account annexed, for which he prays judgment with damages.

The cause was finally submitted to amicable compounders who brought in an award of \$657 97 in favor of the defendant.

On motion to make the award the judgment of the court, it was opposed by the plaintiff on various grounds; but not attacked through fraud or any misconduct in the persons acting as amicable compounds; only as being grossly erroneous.

The objections were all overruled and the award entered up as the judgment of the court, from which the plaintiff appealed.

*Elam*, for the plaintiff and appellant.



EASTERN DIS.  
March, 1841.

*R. N. & A. N. Ogden*, for the defendant.

*Morphy J.* delivered the opinion of the court.

CANTY  
VS.  
SEAL.

The plaintiff sued for a settlement of accounts with defendant as managing partner of an association formed between them to carry on the business of brick making. In default of defendant's rendering such account, it is prayed that he may be decreed to pay \$1,587, for the value of the services of certain negroes furnished by plaintiff to the concern, and moreover \$500 as damages. The answer charges that plaintiff has failed to comply with his engagements to defendant; that he has not furnished any of the things he was bound to provide nor made any of the stipulated advances of funds to the partnership. To this answer are annexed accounts of the receipts and expenditures of the concern and of several sums due by plaintiff to defendant which the latter offers in compensation of all claims against him. He prays judgment for such balance as may be found due to him, and for \$2,000 damages for the violation of the contract on the part of plaintiff. On these pleadings, the matters in dispute were, by consent of parties and under an order of court, submitted to James Cooper and Daniel Barbee as amicable compounders; and it was agreed that their report should be made the judgment of the court. The referees made and returned into court in due time their award, decreeing plaintiff to pay to defendant \$657 97. Notwithstanding a motion to set aside this award, it was homologated and made the judgment of the court below. The plaintiff appealed.

It is not pretended in this case that there has been on the part of the arbitrators any fraud, misconduct or extreme partiality. It is admitted on the contrary that the errors complained of were honest and unintentional; but it is said that without imputing to them the intention of so doing, yet it is evident that their award exhibits a want of due respect to common and established rules in regard to right and wrong;

and that the submission did not authorize them to pass on any other matters or accounts than those of the partnership. The latter complaint appears to us without foundation. The private claims of defendant against plaintiff were not objected to when included in his reconventional demand, and all the matters in dispute as exhibited by the pleadings were submitted to the amicable compounders; the intention of the parties seems to have been that they should pass upon, and settle all accounts whatever between them. As to any errors alleged to have been committed in this award, even were they as obvious as represented by the appellant (which from an inspection of the record we are by no means prepared to admit;) we do not feel ourselves authorized to inquire into them. Whatever has been honestly done in relation to the matters actually referred to the decision of the amicable compounders, cannot be revised or altered by a court of justice; Code of Practice, art. 459 and 460; La. Code, art. 3077, 3096. In *Davis vs. Leeds*, 7 La. Rep. 477, this court said, "If parties will submit their disputes to be decided by men chosen by themselves as Judges, under the appellation of amicable compounders, they must abide their judgments without hopes of having them revised by the courts of justice, established by the Constitution and Laws of the State. Such Judges are not required to determine according to the strictness of the law; they are authorized to abate something of this strictness in favor of natural equity." This, we must presume, the arbitrators have done in this case, as they stand before us acquitted of any improper or corrupt motives in rendering their award.

It is therefore ordered that the judgment of the District Court be affirmed with costs.

EASTERN Dis.  
March, 1841.

CANTY  
vs.  
BEAL.

When all the matters in the pleadings are submitted to amicable compounders, that they should pass upon and settle all accounts between the parties, their award, when there has been no fraud, misconduct or extreme partiality, will be made the judgment of the court, without revision or alteration.

EASTERN DIS.  
March, 1841.

**COPELAND vs. MICKIE ET AL.**

COPELAND  
vs.  
MICKIE ET AL.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF  
WEST FELICIANA, THE PARISH JUDGE PRESIDING.

Where an answer is put in and acted on, it cannot afterwards be objected to or assigned for error, that the clerk omitted to mark it *filed*.

The acts of a party from which the ratification of a contract is sought to be deduced, must evince clearly and unequivocally his *intention to ratify*. If his acts be in any manner accounted for without a ratification of the contract necessarily resulting from them, they do not amount to an approval or confirmation.

No tacit approval or ratification of an act or contract is recognized, except that which results from the fact of suffering the time to elapse within which the rescissory action may be exercised.

So in a contract of sale procured by threats and violence, and where the party received the money, partly through necessity and from the belief that it was incumbent on him to use diligence to collect the draft in which he was to be paid, but he soon after tendered the money and demanded a rescission of the sale: *Held* that in thus receiving the money, there was no *intention* manifested to ratify the sale.

This is an action for the rescission of a sale, alleged to have been procured by threats and violence, and for damages.

The plaintiff alleges that in April, 1835, he became a partner in equal right with James F. Mickie in the ownership and cultivation of a plantation and gang of slaves, one undivided half of which was on the above date conveyed to him by said Mickie, who was previously the sole proprietor thereof. That they continued to cultivate and carry on said plantation, alternately in the absence of each other; until the 24th December following, when said Mickie without any pretext of bad management on his part, with force of deadly weapons and violence, aided by other persons, forced him to sign an act of sale at midnight reconveying all his right, title and interest in said property for the paltry sum of \$3000, when in fact it was worth \$30,000. He expressly charges that he was compelled forcibly to sign said act of sale, and that his interest in said plantation was forcibly, violently and knavishly wrung and extorted from him for the inadequate sum of \$3000, which from

terror and fear he was constrained to accept; that he shortly afterwards and since tendered to said Mickie the said sum of money and demanded a rescission of the sale and restitution of his rights and interest in said property or otherwise pay him \$30,000. He prays that said sale be rescinded and annulled; that he be restored to his possession and rights to said property; and that he have judgment for \$30,000 in damages for the wrong and injury sustained by reason of the premises.

The defendant admits the re-sale and conveyance to him by plaintiff of the property mentioned, for which he gave him a draft payable ten days after date for three thousand dollars on the house of Shipp, Ferriday & Co., at Natchez, which was paid the 8th January, 1836, which sum was more than equal to his interest in said property; that plaintiff had neither advanced or paid anything for or on account of said property. He further avers that his association with the plaintiff became disagreeable and insupportable on account of a report unfavorable to his character which he took no pains to investigate or clear up, by reason of which he solicited a settlement of their affairs, which resulted in a re-conveyance of all his interest in the concern for the sum of \$3000. He expressly denies that there was any threats, force or violence used on the occasion; that there never has been a tender as alleged, but on the contrary the plaintiff received and still retains the said sum of \$3000 to his use, and expressly and tacitly approved and ratified said sale or contract of re-conveyance. He further denies all the allegations in the petition except so far as they have been expressly admitted, and prays that this suit be dismissed.

On these pleadings and issues the case was tried before the court and a jury.

The defendant died before judgment and the suit went on against his heirs.

There was a mass of testimony taken and read on the trial touching the alleged threats, violence and force used in obtaining a rescission of the first sale, or re-conveyance of the plan-

EASTERN DIS.  
March, 1841.

COPELAND  
VS.  
MICKIE ET AL.

EASTERN DIS. tation and slaves from the plaintiff to the defendant, which  
March, 1841.

COPELAND  
vs.  
MICKIE ET AL.

satisfied the jury that unfair means had been used. There was a verdict rescinding the re-conveyance or sale of 24th December, 1835, to defendant, and restoring the parties to their former relative situations; and that the plaintiff recover for rents and revenues accruing from the plantation the sum of \$8184; and the further-sum of \$6000 in damages.

After an unsuccessful attempt to obtain a new trial, from judgment confirming this verdict the defendants appealed

*Andrews & Muse*, for the plaintiff and appellee.

*Turner, R. N. & A. N. Ogden, and Thomas*, for the defendants.

*Morphy, J.* delivered the opinion of the court.

This action is brought to annul and set aside a sale alleged to have been extorted from plaintiff by threats and violence on the part of defendant, and to claim \$30,000 in damages. The petition charges, that on the 8th of April, 1835, plaintiff became a partner in equal right with the defendant in the ownership and cultivation of a tract of land near the mouth of Red River, containing about nineteen hundred acres, together with eleven slaves and all the improvements, stock, farming utensils, &c., appertaining to it; one undivided half of all which property was conveyed to the petitioner by defendant, by a deed executed before John B. Dawson, the parish Judge of West Feliciana. That on the same day the defendant also sold to plaintiff an undivided half in the property of certain other slaves and two horses, then employed on and attached to the plantation. That these sales were made in pursuance of a contract of partnership antecedently agreed on and accordingly defendant and plaintiff in the character of partners, jointly and alternately in the absence of one another, managed and conducted the plantation and slaves up to the 24th of December, 1835, when the defendant without any

pretext of bad management or provocation on the part of plaintiff, but solely with a view to wrest from him by force and violence his just rights in and to the said property, armed with deadly weapons, dirks and pistols, and in company with others, particularly with one James Bass, did seek, pursue and find plaintiff at the house of one Hamilton Orr, in the parish of Pointe Coupée; and then and there in a rude, violent and menacing manner demanded of him a rescision of the sales of the property held in partnership between them, to which demand the plaintiff promptly refused to accede. That thereupon the said James F. Mickie supported by his companions drew his pistol and with the same inflicted several blows on the head of plaintiff, declaring that in the event of further resistance or refusal to comply with his demand, he would shoot him; that plaintiff believing his life to be in danger from the threats and acts of the said Mickie and his party, suffered himself to be taken without resistance across the Mississippi, into the parish of West Feliciana, in the direction and course of the plantation of one Francis Routh; that the party having plaintiff in *duress* met with the said Routh and one John Harmanson, who from their remarks and manner at once betrayed a perfect understanding of the treatment meditated against the plaintiff; that he was then handed over to the said Routh and Harmanson who conveyed him to the house of one Peggy Philips, declaring that their object was to force him to surrender all his interest in the partnership to defendant; and that if he would not do it voluntarily he should be *lynched* into it; that defendant and his party finding that persuasion was of no avail, took the petitioner at some distance from the house and there told him in a tone and manner indicative of force and violence, not to be misunderstood, that they were then prepared to deal with him as he might refuse or comply with the proposition made to him for the last time to surrender to defendant all his interest in the partnership, property for \$3000; that the plaintiff finding

EASTERN DIS.  
March, 1841.

COPELAND  
VS.  
MICKIE ET AL.



EASTERN DIS. himself in the power of an armed party and conscious that  
March, 1841. resistance was useless, assented to every thing proposed; that

COPELAND  
VS.  
NICKIE ET AL.

he was then conducted to the dwelling house of said Routh at a late hour of the night and confined under the guard of John Harmanson in a separate apartment until a deed of conveyance for his interest in one half of the property was prepared, when he was taken into the presence of Judge Dawson for the purpose of signing the said deed, which from fear and terror the petitioner signed in the night of the 24th December, 1835.

The petition further charges that plaintiff's interest as partner in and to said plantation and slaves as also one half of the crop was fully worth \$30,000 on the 24th of December, 1835; and that said interest was thus forcibly, violently and knavishly wrung and extorted from him for the inadequate sum of \$3000, which from fear and terror he was constrained to receive; but that since he has made a tender to defendant of the \$3000, and demanded the restitution of his rights as partner to the said property, or the payment of the said sum of \$30,000, with either of which demands the defendant has refused to comply.

The answer admits the reconveyance to defendant of plaintiff's interest in the partnership property for \$3000, paid to him in defendant's draft on the house of Shipp, Ferriday and Co, at Natchez, the proceeds of which the plaintiff received on the 8th of January, 1836: It avers that said sum was more than equal to the value of such interest, as plaintiff never paid one cent on account of the property sold to him on the 8th of April, 1835, and never advanced any money towards supporting the expenses of the plantation and negroes; the answer further avers that defendant's association with plaintiff had become disagreeable and insupportable to the former, in consequence of a report unfavorable to the character and conduct of plaintiff, which report he took no pains to investigate although it had acquired currency in their neighbourhood;

that by reason of this, respondent solicited a settlement of their affairs, which resulted in a reconveyance of the property sold to him by defendant; the answer denies that there was any force or threats used to obtain such reconveyance, or that any tender in law or in fact was ever made to defendant of the \$3000, but that on the contrary plaintiff received and kept said sum, thereby approving and satisfying the contract and depriving himself of the right to sue for its rescission.

On these pleadings the parties went to trial before a jury who gave a verdict rescinding the sale of the 24th of December, 1835, and decreeing defendants to pay \$8184 for rents and revenues arising from the plantation, and the additional sum of \$6000 for further damages. After a strenuous but unsuccessful effort to obtain a new trial the defendants appealed.

Before considering the merits of this case, it is proper to notice an error assigned by the defendants as apparent on the face of the record. It is, that although the death of James F. Mickie was suggested of record below, the cause was afterwards tried without citation to, or any answer filed by the heirs of defendant, and that therefore the judgment was illegally rendered against them; they being in no manner parties to this suit. When the record was brought up last year, a *certiori* was prayed for by the appellee on the ground that an answer filed in the name of the representatives of the defendant, who had died after issue joined, was not to be found in the record; and was supposed to have been omitted in it by mistake. A certified copy of this answer has been filed in this court on the 8th of February last, from which it appears that David C. Mickie and N. S. Nichols, styling themselves sole surviving heirs of the late James F. Mickie, appeared below to defend the suit; leave of the court having first been obtained. They denied all the allegations of the petition, adopted the answer of the original defendant as their own, &c. This answer is signed by *Johnson, Bullard & Thomas* as attorneys; and the clerk certifies it to be a true copy of the original

EASTERN DIS.  
March, 1841.

COPELAND  
vs.  
MICKIE ET AL.

**EASTERN DIS.** answer of the heirs of James F. Mickie; as found among the  
March, 1841. papers of this suit; and moreover that it had been copied by

**COPELAND**  
**VS.**  
**MICKIE ET AL.**

him with the other documents of the case into the record sent up to this court but was afterwards taken out on the suggestion of James Turner, Esq., one of the counsel of the appellants, he having discovered that the paper had not been marked *filed*. The appellee's counsel has made his affidavit that this answer was among the papers of the case before it was assigned, and was used on the trial below. This statement has not been directly contradicted, but we are pressed on the authority of the case of *Monroe vs. M'Micken*, in 8 Martin, N. S., 514, to consider the heirs of James F. Mickie as having never been parties to the suit because the clerk has omitted to endorse their answer as *filed*. This we are by no means prepared to do; the case alluded to is evidently different from the present. There the objection came from the opposite party who was not bound to notice the defendant's answer until it was filed; and who complained that he had not had sufficient time to examine it before the jury was sworn. This case exhibits the strange spectacle of the appellants' counsel urging us to disregard their own answer after the case has been fully tried on its merits below, and when it is not pretended that the authority of the counsel who signed it is disavowed by the parties; other gentlemen, it is true, have been engaged and have appeared in this court, but this does not, in our opinion, alter the case; the record, moreover, shows that one of the appellants' counsel here, James Turner, made a motion for a new trial below, in conjunction with Bullard and Thomas, two of the attorneys who signed the answer of the heirs, and

When an answer is put in and acted on, it cannot afterwards be objected to or assigned for error, that the clerk omitted to mark it *filed*. among the numerous grounds urged by them in support of their motion, we do not find that so much insisted upon in this court; we cannot then but come to the conclusion that the heirs had made themselves parties to the suit, and cannot now be permitted to take any advantage of the clerk's omission to endorse their answer.

On the merits, plaintiff has substantially made out his case as set forth in his petition. A stronger one can hardly be imagined and we cannot refrain from expressing our abhorrence of the lawless and ruffian-like conduct of the participators in this scene of violence and bloodshed. The circumstance of plaintiff having signed the contract in the presence of Judge Dawson without any positive resistance does not prove his consent to have been voluntary; it might well be imagined that he was yet under the influence of fear and terror, and that he dreaded the treatment which might be reserved for him in case he was refractory to the will of those in whose power he was. The expression, "*I suppose I must sign the paper,*" used by the plaintiff before signing, showed his reluctance to do it, but they were then not noticed or attended to by the magistrate who had not the least intimation of what had passed, and who had stopped accidentally at Routh's house that evening in a state of extreme indisposition. It is said that admitting the contract to have been violently extorted from plaintiff in the first instance, he subsequently approved and confirmed it by receiving voluntarily the money after the violence complained of had ceased. We believe the true doctrine on this subject to be that the acts of the party from which a ratification is sought to be deduced must evince clearly and unequivocally his intention to ratify; if his acts can be in any manner accounted for, without a ratification of the contract necessarily resulting from them, they show no approval or confirmation on his part. 8 Toullier, page 705; No. 506, 507; Story's Equity Jurisprudence, sec. 307; 13 La. Rep., 172. From the terms of article 1849 of the Louisiana Code it would seem that our law in a case like the present, recognizes no tacit approval except that which results from the fact of suffering the time to elapse within which the rescissory action can be exercised; such appears also to be the doctrine of Pothier; *Traité des obligations*, page 20, No. 21. But be this as it may, and applying to this case the ordinary rules of tacit ratification, we cannot see in all the

EASTERN DIS.  
March, 1841.

COPELAND  
VS.  
MICKIE ET AL.

The acts of a party from which the ratification of a contract is sought to be deduced, must evince clearly and unequivocally his intention to ratify. If his acts be in any manner accounted for without a ratification of the contract necessarily resulting from them, they do not amount to an approval or confirmation.

No tacit approval or ratification of an act or contract is recognized, except that which results from the fact of suffering the time to elapse within which the rescissory action may be exercised.

**EASTERN DIS.** acts of plaintiff taken together any intention to confirm the  
March, 1841, sale extorted from him. It is true, that on his arrival at  
**COPELAND** Natchez he received a hundred dollars from the drawees of the  
**VS.**  
**MICKIE ET AL.** draft; this, his necessities might have compelled him to ask of

So in a con- them, driven as he was from his home and reduced to a state of  
 tract of sale destitution. As to the balance of the sum he afterwards re-  
 procured by ceived, it might well be, as he avers, that having received in  
 threats and vio- payment a draft payable ten days after sight, he believed it his  
 lence, & where duty to use due diligence to collect it, lest in case he should  
 the party re- fail in the present suit, he might lose both his property and  
 ceived the mo- the paltry sum given for it; but shortly after this, we find the  
 ney, partly thro' plaintiff depositing the money in the hands of a broker in  
 necessity and Natchez and advising the defendant of the deposit; and of his  
 from the belief intention to bring the present action. This course of conduct  
 that it was in- does not, to our mind, show any intention of confirming the  
 incumbent on him sale.  
 to use diligence to collect the  
 draft in which he was to be  
 paid, but he  
 soon after ten-  
 dered the mo-  
 ney and deman-  
 ded a rescission  
 of the sale; held  
 that in thus re-  
 ceiving the  
 money, there  
 was no intention  
 manifested to  
 ratify the sale.

The just indignation of the jury who tried this cause be-  
 trayed them into errors which it is our duty to correct. After  
 allowing \$8140 for the fruits and revenues arising from the  
 plantation, they gave \$6000 for further damages. The peti-  
 tion does not purport to claim either the fruits and revenues  
 of the land or any damages for the personal wrongs sustained  
 by the plaintiff. After setting forth the threats and acts of  
 violence used to compel plaintiff to surrender his interest in  
 the partnership, the petition avers that this interest with one  
 half of the crop of that year were at that time worth \$30,000,  
 and that before bringing the present action, plaintiff had de-  
 manded of defendant either the restitution of all his rights as  
 partner, or the payment of \$30,000 in lieu thereof; thus show-  
 ing clearly that the damages of \$30,000 mentioned in the  
 prayer of it were intended for the wrong and injury done to  
 plaintiff by depriving him of his interest in the partnership,  
 and the whole evidence goes to show the value of the slaves,  
 of the land, and of the improvements; but this sum the plain-  
 tiff could not demand together with the restitution of the pro-

erty itself. He has lost none of his rights as a partner under the act of the 8th of April, 1835; and can call upon defendants to account for the fruits and revenues of the land, and for a settlement of the partnership; but he cannot claim as a partner any specific sum, because a liquidation of the concern can alone show the profits to be divided if any there be. *Mead vs. Curry*, 8 Martin, N. S., 281. As to the personal wrongs suffered by the plaintiff, it does not appear from the pleadings or evidence that he intended to seek redress for them in the present action; and the record shows that shortly after the inception of this suit, criminal prosecutions were instituted against Mickie, Bass and Harmanson, for assault and battery and false imprisonment. This view of the case makes it unnecessary to examine whether vindictive damages can or ought to be awarded against the heirs of the wrong doer.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed, except in that part of it decreeing defendants to pay \$8140 for fruits and \$6000 for damages, which is hereby reversed; the plaintiff and appellee paying the costs of this appeal.

EASTERN DIS.  
March, 1841.

DOMINGUEZ  
vs.  
LEE ET AL.

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DOMINGUEZ vs. LEE ET AL.

APPEAL FROM THE COURT OF THE THIRD DISTRICT FOR THE PARISH OF EAST  
BATON ROUGE, THE JUDGE THEREOF PRESIDING.

Property bought with the funds of the wife, or acquired by her in consequence of a *datien en paiement* made to her by her tutor, and which never came under the husband's administration, is her separate or paraphernal property.

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EASTERN DIS.  
March, 1841.

DOMINGUEZ

VS.

LEE ET AL.

The wife has the power to administer alone her paraphernal estate as she pleases; and a right to alienate her separate property and to invest her paraphernal funds in whatever manner she thinks proper and most advantageous to her interest, if done with the authorisation of her husband.

Property purchased with the paraphernal funds of the wife is only her separate property as long as she keeps the administration of her separate estate, and when the title is taken in her own name, either as a purchase with the funds she administers without the assistance of her husband, or as a *datien en payement* made to her by the debtor of a separate and paraphernal claim.

Where a house and lot, the separate property of the wife, is mortgaged by husband and wife for improvements and ameliorations put on them, *these last* become a part of the community of acquets and gains, and are liable for the husband's debts.

This suit commenced by injunction. The plaintiff alleges she inherited \$1,100, from her father, which came into the hands of her tutor; that she was compelled to take a house and lot in the town of Baton Rouge from her said tutor, valued at \$975, for this much of her claim, which was conveyed to her as her separate and paraphernal property with the consent and assistance of her husband; that she has always administered and considered this as paraphernal property.

The plaintiff further shows that her husband confessed a judgment for \$1,945 in favor of the defendants, who have taken out execution and caused it to be levied on said house and lot, and are proceeding to sell the same. She alleges such seizure is tortious and illegal, and in violation of her rights, and prays that an injunction issue, restraining said sale and forever enjoining and prohibiting it; that she be declared the only and true owner of said property, to hold it as her separate and paraphernal estate, &c.

The defendants pleaded a general denial and prayed that the injunction be dissolved with damages.

The evidence showed that the property in question, or rather the lot with an old building on it, was acquired by the wife by a *datien en payement* made by her tutor for a part of the money he owed to, her; that it was so acquired during marriage with the consent of her husband and separately

administered by her; but that her and her husband mortgaged it to one Jean Sans for \$1000, to be laid out in putting improvements and ameliorations on the lot: that in this situation and condition it has been seized and advertised for sale by the defendants, as judgment creditors of the plaintiff's husband.

The District Judge being of opinion the seizure was wrongfully made, perpetuated the injunction. The defendants appealed.

*Brunot*, for the plaintiff.

1. The evidence clearly establishes the property to be the separate and paraphernal estate of the plaintiff, and not liable to the payment of the husband's debts. Vide 5 Martin, N. S. 255. 1 La. Rep. 201. 7 Idem 292. 8 Martin, N. S. 230.

2. The evidence showing the property to be in the wife, the law raises the presumption that if this property is ameliorated or improved it was at the cost and expense of the owner. Vide La. Code, art. 496, 497, 498.

3. It is in proof that the wife mortgaged her own paraphernal estate to secure the payment of the money which she advanced to make repairs on said estate. There is no proof that she ever gave the administration of her paraphernal estate to her husband, nor is there any evidence adduced by the defendant to destroy the presumption of law in her favor. La. Code, art. 2361, 2377.

*Elam*, for the defendants, urged the reversal of the judgment on several grounds.

*Simon, J.* delivered the opinion of the court.

Plaintiff states that she inherited from her father the sum of \$1100, which came into the hands of her tutor; that her said tutor being unable to pay over to her the said sum of money in cash, gave her in lieu of part thereof (\$975) a lot of ground which she describes, situated in the town of Baton Rouge, together

**EASTERN DIS.** with the buildings thereon erected. That being a married woman at the time of the transfer of the property, she received  
*March, 1841.*

**DOMINGUEZ**

**VS.**

**LEE ET AL.**

man at the time of the transfer of the property, she received the same with the authorization of her husband, and from the stipulations in the act of sale, the lot so received in payment became her paraphernal property, which she has always continued to administer as such. She further represents that by virtue of a writ of fi. fa. the defendants, who are judgment creditors of her husband, have caused the said property to be seized, and are about proceeding to sell the same. She prays for a writ of injunction to arrest the sale of the lot and buildings, and that the same be declared to be her paraphernal property, not subject to the payment of the defendants' claim, &c.

Defendants pleaded the general issue, and the district judge being of opinion that the lot of ground and buildings thereon erected were the plaintiff's paraphernal and separate property, perpetuated the injunction. From which judgment, after an unsuccessful attempt to obtain a new trial, defendants appealed.

The evidence shows that the plaintiff really received the lot of ground described in her petition, in part payment of the amount due her by her tutor; and that at the time of the transfer, there was an old building upon it; that subsequently certain improvements were made upon it, and a new house erected thereon, and that for the purpose of paying for the materials, workmanship and construction of the same, a sum of money was raised by mortgaging the premises. The act of mortgage recites that the appearers (husband and wife) are indebted to Jean Sans in the sum of \$1000 for money and effects advanced to them to enable them to construct and erect the house in which they reside on the lot in question; for which they give to the mortgagee a written obligation payable one year after date with interest, and which is secured by a special mortgage which the wife consents to give on her aforesaid property, &c., &c. There is no evidence that the amount of the note secured by the mortgage was ever paid; and if it was

paid, that it was so with the plaintiff's funds. The improve-  
ments are also proven to be worth from \$1500 to \$2000.

EASTERN DIS.  
March, 1841.

DOMINGUEZ  
vs.  
LEE ET AL.

A careful examination of the first question submitted to our consideration, has brought us to the conclusion that the judge *a quo* did not err in declaring the lot of ground with the building thereon standing at the time of the transfer to be the plaintiff's paraphernal property; indeed, the evidence shows conclusively that she acquired it by virtue and in consequence of a *datien en payement* made to her by her tutor; he owed her a sum of money which never came into the hands of the husband, and which consequently never was put under his administration, and when, with the authorization of her said husband, she accepted the transfer of the property in lieu of the money, she did nothing but exercising her right of administering her paraphernal estate, and investing her paraphernal funds in the acquisition of real property.

Property bought with the funds of the wife, or acquired by her in consequence of a *datien en payement* made to her by her tutor, and which never came under the husband's administration, is her separate or paraphernal property.

It is true, as a general rule, that the law considers to be common property that which is acquired by the husband and wife during the marriage, although the purchase be only in the name of one of the two and not of both. *La. Code, art. 2371; 10 La. Rep., 148.* The reason is that in that case, the period of time when the purchase is made, is alone attended to, and not the person who made it. But we are not ready to say that no distinction ought to be made, when the property is clearly shown to have been bought with the separate funds of one of the parties, and particularly with funds of the wife which never came under the administration of the husband. *1 La. Rep., 523.* It is a well settled doctrine in our jurisprudence that money received during the marriage, even by the husband, on account of his wife, does not fall into the community, but remains her separate property *7 idem, 292.* According to article 2361 of the Louisiana Code, the wife has the right to administer personally her paraphernal property without the assistance of her husband; and by the article 2315, paraphernal is considered as the separate property of the wife. There

The wife has the power to administer alone her paraphernal estate as she pleases, and a right to alienate her separate property and to invest her paraphernal funds in whatever manner she thinks proper and most advantageous to her interest, if done with the authorization of her husband.

EASTERN DIS. necessarily results from these provisions of the law, a power  
March, 1841. allowed to the wife to administer alone her paraphernal estate,

DOMINGUEZ

VS.

LEE ET AL.

as she pleases; and a right to alienate her separate property, and to invest her paraphernal funds in whatever manner she thinks proper and most advantageous to her interest, provided she does it with the authorization of her husband. She may even resume the administration of her extra-dotal property, previously confided to her husband, and also demand restitution of what is the object or price of it whenever she chooses. *La. Code, art. 2368; 8 Martin, N. S., 228.*

Property purchased with the paraphernal funds of the wife is only her separate property as long as she keeps the administration of her separate estate, and when the title is taken in her own name, either as a purchase with the funds she administers without the assistance of her husband, or as a *datien en payement* made to her by the debtor of a separate and paraphernal claim. We must not, however, be understood as intimating that property purchased with the paraphernal funds of the wife, ought in all cases to be considered as her separate property: this takes place only as long as she keeps the administration of her separate estate, and when the title is taken in her own name, either as a purchase with the funds she administers without the assistance of her husband, or as a *datien en payement* made to her by the debtor of a separate and paraphernal claim. *1 La. Rep., 523.* But if the purchase is made by the husband and in his name, the property, though bought with the funds of his wife, belongs to the community, and the price given constitutes in her favor a legal charge against said community. *10 idem, 180.*

In support of the opinion above expressed, which establishes an exception to the general rule, that property acquired during the marriage by purchase, whether it be bought in the name of either husband or wife, becomes common to both; it may not be unimportant to remark that there are other exceptions contained in our laws which may also serve to show the relative effect of the rights of the spouses towards each other with regard to property acquired by either of them during the marriage with their respective funds: An immovable bought with the dotal funds, is dotal; and it is the same with respect to an immoveable given in payment of a dowry settled in money. *La. Code, art. 2336.* A contract of sale

between husband and wife is valid in certain cases, and the husband may during the marriage transfer property to his wife, whether separated or not, in payment of her rights, or for the replacing of her dotal and other effects alienated. *La. Code, art. 2421.* Such property purchased or given in payment to the wife during the marriage, does not belong to the community; and we see no reason why, if she can acquire property from her husband in payment of her pecuniary rights, she should not have the right of receiving a *datien en payement* from a stranger for her private benefit or to make purchases with her own separate funds.

EASTERN DIS.  
March, 1841.

DOMINGUEZ  
VS.  
LEE ET AL

Another important question in this case is whether the improvements made on plaintiff's lot with funds proceeding from a loan obtained by mortgaging her property, belong to the owner of the soil who thus jeopardizes the loss of the lot itself for the advantage of its amelioration, or to the community. It is perfectly clear that, as the plaintiff has not shown that such improvements were paid for with her separate funds, the circumstance of her having consented to mortgage her lot of ground to secure the price of the materials and construction cannot give her any right to claim them; they belong to and make a part of the community of acquets and gains. *La. Code, art., 2371; 4 Martin, N. S., 402.* The act of mortgage shows that the debt was contracted by both; the note was signed by the two appearers, and its amount, if it has not already been paid, is necessarily a community debt, to be acquitted out of the common fund. *La. Code, 2372.* Here, no attempt has been made to prove that the wife had any other means but what she received from her tutor, and this excludes the idea that the price of the improvements has been or will ever be paid out of her separate funds.

The law of legal partnership provides that when the hereditary property of either the husband or wife has been improved during the marriage, the other spouse shall be entitled to the reward of one-half of the value of the ameliorations, &c. *La.*



EASTERN DIS.  
March, 1841.

DOMINGUEZ  
VS.  
LEE ET AL.

Where a house and lot, the separate property of the wife, is mortgaged by husband and wife for improvements and ameliorations put on them; these last become a part of the community of acquests and gains, and are liable for the husband's debts.

*Code, 2377.* This provision establishes one of the rules under which the community is to be settled after its dissolution, and when the rights of the wife to such community are legally opened; but her right in the ameliorations made on *her property* is quite distinct from a right *to the property*. 4 *Martin, N. S., 212.* Such right is eventual, and it is only after the dissolution of the community that each party is seized of an undivided half of the property composing the mass; until then, the husband may sell it, exchange it, or even give it away without her consent. The improvements in question, being, as we have already said, a part of the community of acquests and gains, are therefore subject to be seized and sold by the husband's creditors, in satisfaction of debts contracted during the marriage.

We therefore think that the district Judge erred in sustaining the injunction with respect to the improvements made on plaintiff's lot since the purchase.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed, and proceeding to give such judgment as, in our opinion, ought to have been rendered in the court below: it is ordered, adjudged and decreed that the injunction issued in this suit be made perpetual as to the lot of ground described in plaintiff's petition; that said injunction be dissolved as to the buildings and improvements thereon erected, and that the defendants be authorized to levy and execute the writ of *fi. fa.* by them issued against plaintiff's husband on the said buildings and improvements according to law, compensation being made to the plaintiff, by a regular and double estimation, for the value of the old building existing on her lot at the time she purchased it; and that the costs in the court below be paid by defendants and appellants, those in this court to be borne by plaintiff and appellee.

LAVILLE *vs.* RIGHTOR ET AL.EASTERN DIS.  
March, 1841.APPEAL FROM THE COURT OF THE SECOND DISTRICT, FOR THE PARISH OF  
ASCENSION, THE JUDGE THEREOF PRESIDING.LAVILLE  
*vs.*  
RIGHTOR ET AL.

No final judgment can be rendered without an answer filed or judgment by default taken—not even a non-suit; and this being the case, however reluctantly, the court is bound to remand the cause for the proper issues to be made up.

Where the defendants are not all joint obligors and liable in the same manner, different judgments may be rendered, and be final as to some and the case remanded so far as it respects others.

Where the vendor “sells all his *right to the land back of that on which he resides,*” it will be considered a sale at the purchaser’s risk, which implies no warranty, and the questions of eviction and probable disturbance have no application to it.

Parol evidence is admissible to prove agency; and that the agent was employed to make demand on the adverse party and that it was made in writing.

Where the price is not paid, the vendor may obtain a dissolution or rescission of the sale; and the court will fix a day, on which if the price is not paid the sale will be rescinded.

This is an action for the rescission of the sale of land. The plaintiff shows that on the 12th and 20th January, 1836, he sold and conveyed to the defendant, Rightor, by acts under private signature, “all his *right to certain land back of the eighty arpents on which he resided,*” for the sum of \$15,000, one third of which was to have been paid in cash, and the balance in two instalments, for which Rightor was to give good endorsed notes.

The plaintiff further shows that said land extends back, from his 80 arpents front tract, to the River Amite and Lake Maurepas; and that the defendant Rightor has since sold this tract together with other lands, to L. Millaudon, J. Kohn, H. G. Schmidt, John Slidell, Frederick Frey, C. F. Zimpel, and H. T. Williams, who are in possession of the same. He further states that Rightor has failed and refused to pay any part of the price; and continues to refuse, although he has made the necessary demand through a notary in writing and tendered the proper act of sale as was agreed on. The pre-

**EASTERN DIS.** mises considered he prays that all the defendants both Rightor  
March, 1841. and his vendees in possession be cited, and that he have judgment rescinding and annulling said private acts of sale, and the  
**LAVILLE** contract arising therefrom, and that the possession of the land  
**VS.** in question be delivered to him; and that Rightor be condemned to pay him damages.  
**RIGHTOR ET AL.**

The petition was filed the 15th February, 1838. On Tuesday, October 9th, 1838, it was entered on the minutes—"the *defendant* not appearing and no answer having been filed, judgment by default is rendered against the *defendant*."

On the 13th October it is entered on the minutes, "*defendant filing his answer*, it is ordered that judgment by default in this cause rendered, be set aside."

On this day, Rightor filed his answer. He pleaded the general issue; admitted the sale and his purchase of the land in question, and averred his readiness at all times to comply with the obligations he had contracted, but that his vendor had always been and is now unable to comply with the obligations imposed on him by law and in said sale, and which he was bound to execute before defendant is or can be put in default; that at the time of said sale the title was in the name of Mrs. Mary F. Conway, wife of A. Maurin, as her dotal property which she could not alienate. He avers the land was besides this, incumbered with various mortgages; and that his vendees refuse payment on account of the claim set up to the greater part of it by John McDonough, and that payment will have to be suspended until this claim is settled, and they restored to quiet possession; that the plaintiff had instituted a suit for a rescission of the sale on account of lesion which is still pending, vexing and harassing him and causing him much damage; and further, that he has accepted a draft on account of this sale, for part of the price and for the payment of which he is bound. He therefore avers that by reason of all this and that the plaintiff is unable to make him a complete title, and has failed to comply with the obligations imposed on him by law,

he is not bound to pay the price and that this action cannot be maintained. If however the court is of opinion that a failure to pay the price would operate a dissolution of the contract, he asks it to grant him such delay as the law authorizes, to comply with his contract: But if the contract is dissolved he prays for damages in reconvention and the restoration of his accepted draft. He then propounds interrogatories to the plaintiff touching his title and claim to the land; the draft he received and the incumbrances existing on the property.

EASTERN DIS.  
March, 1841.

LAVILLE  
VS.  
RIGHTON ET AL.

The defendants and third possessors, Millaudon, Kohn, Schmidt, Frey and Slidell, all pleaded a general denial. No answers were put in by Williams or on behalf of Zimpel.

At the trial, the defendant asked for leave to amend his supplementary answer which was refused. Williams prayed to be allowed to file his answer, which was objected to and refused by the court.

There was a mass of testimony offered, and several bills of exception taken during the trial, all of which is fully stated in the opinion of this court and need not be recapitulated.

The cause was submitted to the court on the pleadings and evidence adduced; and there was judgment rendered in favor of the defendant. The plaintiff appealed.

*Miles Taylor*, for the plaintiff, insisted that the judgment was erroneous; neither the buyer or his vendees have been disquieted in their possession, nor have they any just fear that they will be. The plaintiff has shown himself ready to comply with his sale. He sold only his *right* and is ready to complete all that remains to be done.

*Isley, Nicholls & Preston*, for the defendant and appellee, argued in support of the judgment.

*Beatty*, for defendant, Williams prayed the affirmance of the judgment.

*Garland J.* delivered the opinion of the court.

EASTERN DIS.  
March, 1841.

LAVILLE  
VS.  
RIGHTOR ET AL.

In the month of January, 1836, the plaintiff agreed to sell *all his right to the land back of the eighty arpents on which he resided*, to the defendant, for fifteen thousand dollars, one third cash and the other two thirds in two annual instalments, to secure the payment of which, the said defendant was to furnish negotiable notes payable in some bank in New-Orleans; a notarial act of sale to be passed at a future period. The defendant took possession of all the land back of plaintiff's, and shortly after, sold it with other lands as the Houma tract, for upwards of \$220,000, to Laurent Millaudon, John Slidell, Henry G. Schmidt, Joachim Kohn, Frederick Frey, Charles F. Zimpel, and Henry T. Williams, who are all made defendants to this suit. The defendant never paid the price or gave his notes, and this action is brought to rescind the sale on account of his failure to do so. To this action Rightor the principal defendant, has made every possible defence and his conduct evinces a disposition to avail himself of all the benefits of the contract and not to perform any of the obligations. In his answer, he admits the contract and says, he has always been ready to comply with the terms of it, but that the plaintiff is unable to comply with the obligations imposed on him by law as vendor, which he was bound to comply with before he could put him (Rightor) in default. He further says, that at the time of the sale the property belonged to Madame Maurin, of which fact on the trial, he offered no evidence. He also avers the property was subject to various mortgages, that he has sold it to his co-defendants and they will not pay him in consequence of a claim set up by John McDonough to the whole or a part of the land, by which he and they are disquieted in their possession and fear eviction.

He further avers, the plaintiff had brought a suit against him to annul the contract on account of lesion, by which he suffered great damage. He says he has not been legally put in default. Further, that Laville had drawn a draft on him for twelve hundred dollars which he is legally bound to pay

and also that the plaintiff has not complied with his part of the contract, and cannot make him a good and legal title.

EASTERN DIS.  
March, 1841.

The contract is on file, and we find in the record an acknowledgment in a letter from Rightor to Laville, dated April 3d, 1838, that he had been previously called on to comply with his contract and he declined doing so, until the mortgages of Hampton and Dubertrand were released. Subsequently, Laville obtained a release of those mortgages, and on the 23d. of August following, he applied to a notary named Pujos and requested him to write a letter to Rightor, informing him he had obtained a release of the mortgages mentioned and was ready that day or the next to pass him a sale. The witness says he signed the letter as notary, at the request of Laville and left it at Rightor's domicil. Shortly after, the latter came to his office, asked for Laville, and upon being informed he was not then present, he said he could not be detained, that he would answer him and asking for writing materials he wrote the following note :

LAVILLE  
ES.  
RIGHTOR ET AL.

Donaldsonville, August 24, 1838.

Ten o'Clock.

I am here ready to pass the sale, but not finding you ready, I am obliged to leave the town for several days.

(Signed) A. F. Rightor.

To Mr. F. Laville.

Laville was at the time in the village of Donaldsonville, had called frequently in the course of the morning inquiring for Rightor, and came in a short time after he had left the office. When Rightor went to the office the notary told him he had sent for him to pass the sale, he did not express a wish to have it passed, nor did he inquire for the certificate stating the mortgages were released, which the notary had in his possession.

The first question our attention is called to, is an error apparent on the face of the record, which is, that no judgment by default has been taken against Williams and he has not an-



**EASTERN** Dis. s. w. e. r. e. d. The record shows that Rightor and Williams are resi-  
March, 1841. dents of the same parish, were included in the same citation

**LAVILLE** and service made on them the same day. On the 9th of Oc-  
**vs.** tober, 1838, it is said on the record, after stating the suit as  
**RIGHTOR ET AL.** being against Rightor et al., "in this case the defendant not  
 appearing and no answer having been filed, judgment by de-  
 fault rendered against defendant." On the 13th of the same  
 month, Rightor filed his answer and the following entry was  
 made: "Defendant filing his answer it is ordered that the  
 judgment by default in this case rendered be set aside." At  
 first, we supposed it was a clerical error, but upon examining  
 the opinion of the district judge, we find he relies upon it par-  
 ticularly as the reason for entering a judgment of non-suit  
 against the plaintiff and that it is so entered on the minutes of  
 the inferior court. It has been urged that the default may ap-  
 ply to Williams as properly as to Rightor, which is very true,  
 and if there was nothing else in the record we might be dis-  
 posed so to construe it. But independent of the fact, that  
 whatever judgment by default was rendered has been set aside  
 and annulled, it appears that the legal delay accorded to  
 Williams' co-defendants, the third possessors of the land, had  
 not expired, and as he and they did not stand in the same posi-  
 tion as Rightor did, it is possible the plaintiff intended the judg-  
 ment should only have effect against him, and that he would  
 join Williams in the judgment he intended to take against  
 Millaudon, Kohn and the other defendants; but as they answer-

No final judg-  
 ment can be  
 rendered with-  
 out an answer  
 filed or judg-  
 ment by default  
 taken—not even  
 a non-suit; and  
 this being the  
 case, however  
 reluctantly, the  
 court is bound  
 to remand the  
 cause for the  
 proper issues to  
 be made up. ed, no default was ever taken afterwards. We have most re-  
 luctantly come to this conclusion, as the omission is calculated  
 to delay the administration of justice and increase the costs of  
 the suit, yet the law is so positive, that no final judgment shall  
 be rendered without an answer filed or judgment by default  
 taken, that we cannot resist its commands, and it is a matter of  
 some surprise how the district judge could have rendered a  
 final judgment, and base his opinion on the ground that the  
 issues were not made and one of the parties not properly before

him. As soon as he discovered there was no judgment by default against Williams he should have arrested the proceedings against him and the other third possessors, until the issues were properly joined between them and the plaintiff. The case as to Williams, Millaudon, Slidell, Kohn, Schmidt, Frey and Zimpel was improperly tried and must be remanded to have the proper issues made up between the parties, but we do not see such a connection between Rightor and the other parties as makes it necessary to remand the case as to him. Though joined in the suit with the others, he is not a joint obligor with them nor is he liable in the same manner. His responsibility is separate and distinct and a different judgment must be rendered as to him. It is sometimes the case that one action can be maintained against several persons in relation to the same thing or obligation, their responsibility may be very different—the suit may be tried as to one and continued as to the others.

*EASTERN DIS.  
March, 1841.*

*LAVILLE  
vs.  
RIGHTOR ET AL*

Where the defendants are not all joint obligors and liable in the same manner, different judgments may be rendered; and be final as to some and the case remanded so far as it respects others.

Before proceeding further in this investigation, it is proper we should examine the contract between Laville and Rightor and understand what was sold and intended to be purchased. The plaintiff says he only sold his *right* to the land back of the eighty arpents on which he resided and that the sale does not imply a warranty. The defendant says he purchased the land and that the plaintiff must guarantee the title and the law implies it. The contract does not state where the land is situated, what are the boundaries, the quantity, or any thing else that is certain. "I sell all my *right* to the land back of the eighty arpents where I reside." There is no other description or designation, other than that the sheriff had the whole under seizure. Now what land was sold? what quantity, and boundaries had it? What was there to warrant and what is the extent of the liability? How is it to be ascertained in case of eviction? The sale appears to be such as is contemplated by the Louisiana Code, articles 2424, 2425, 2426; and taken at the peril and risk of the purchaser, according to article 2481, and im-

Where the vendor "sells all his *right* to the land back of that on which he resides," it will be considered a sale at the purchaser's risk, which implies no warranty, and the questions of eviction and probable disturbance have no application to it.

**EASTERN DIS.**  
**March, 1841.**

**LAVILLE**  
**VS.**  
**RIGHTOR ET AL.**

Parol evidence is admissible to prove agency; and that the agent was employed to make demand on the adverse party and that it was made in writing.

plies no warranty. The questions of eviction and probable disturbance have no application to this contract. The defendant bought a hope, an expectancy, and must take the consequences of his bargain. The plaintiff does not say the land is his, he only has some indefinite right, but whether a lease, a servitude, a usufruct, or something else, we are in the dark.

The first bill of exception is as to the opinion of the court admitting Pujos to testify that he was the authorized agent of the plaintiff to make the demand on Rightor. Parol proof it is said is inadmissible to prove the agency. No legal principle is plainer than the reverse of the proposition. Independent of that, the plaintiff admits Pujos was his agent for the purpose.

The second bill of exception is not more tenable than the first. The second clause of the article 1905 of the Code prescribes different modes of putting a party in default. One by a suit commenced, the evidence of which is the record. The second, a demand in writing, which may be made in any form that is intelligible, by a party or his agent, and proof by parole or the written acknowledgment of the party of the delivery or receipt of the demand must be presented. The third is a demand, named by a notary in his official capacity and the evidence of it, is the formal protest. The fourth is the verbal demand in the presence of two witnesses, who must prove it in the ordinary manner. The judge was therefore correct in overruling the objection to the evidence, as Pujos was competent to prove the demand in writing.

The two remaining bills need not be examined as they relate to evidence about the probability of eviction and disturbance, which is not admissible in this case.

The evidence of having put the party in delay is satisfactory and the defendant admits in effect in his letters that he had received the written demand. His letter of the 23d of August, 1838, the evidence of the notary, and his whole conduct shows

it was not his intention to accept a sale, but to rely upon technicalities to delay payment of the price.

The question whether the action can be maintained against the third possessors and Rightor, it is not proper now to decide. We have no doubt it can be maintained against him alone and judgment be rendered.

The article 2539 of the Code provides for a dissolution of the sale, if the price is not paid, and the evidence in this case clearly shows that not a dollar has been paid on account of it, and we see no sufficient reason for withholding it.

In exercising the discretion vested by the article 2540 of the Code, we do not think the defendant is entitled to the full delay we are authorized to extend under it.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled and reversed; that the cause as to Williams, Millaudon, Kohn, Schmidt, Slidell, Frey and Zimpel be remanded to the district court to be proceeded in according to law; and proceeding to give such judgment as, in our opinion, ought to have been given in the court below against the defendant, Rightor: it is further ordered and decreed that unless the defendant, Rightor, pay to the plaintiff on or before the first day of June, 1841, the price of the property sold, to wit, fifteen thousand dollars with interest at five per cent. from the time it was due according to the contract, the contracts of sale entered into between him and the plaintiff on the 12th and 20th days of the month of January, in the year 1836, be rescinded, cancelled and dissolved—and it is further ordered that the defendant, Rightor, pay all the costs that relate to him in this court and the court below, the costs of the other defendants in this court to be paid by the plaintiff and appellant.

EASTERN DIS.  
March, 1841.

LAVILLE  
VS.  
RIGHTOR ET AL.

Where the price is not paid, the vendor may obtain a dissolution or rescission of the sale; and the court will fix a day, on which if the price is not paid the sale will be rescinded.

EASTERN DIS. **DUKE OF RICHMOND, et al., vs. MILNE'S Executors, et al.**  
 March, 1841.

DUKE OF  
 RICHMOND ET AL.  
 vs.  
 MILNE'S EXECU-  
 TORS ET AL.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF NEW ORLEANS.

The town of Fochabers, in Scotland, is a burgh of Barony under the ducal family of the Duke of Richmond, incorporated as such; has a right to enjoy the privileges allowed them as a corporation, and as such has capacity to receive by *donations intervivos* or *mortis causâ*, which right it can exercise by trustees.

A particular legacy is to be discharged in preference to all others, out of the funds of the succession; and in default of funds it is to be paid as long as the estate is administered by executors indifferently out of the personal and real estate, and becomes a charge on the whole estate; and descends to the heir as a personal debt when he takes possession. Interest is due thereon.

The capacity of aliens to transmit estates *ab intestato* and to inherit from others in Louisiana is granted; and there is nothing in the laws of this State that excludes aliens from the inheritance of any kind of property.

The incapacity of aliens by the English and Scotch laws is only extended to their *holding lands* or *acquiring heritage*, either by purchase or succession.

Under the laws of Scotland an alien may acquire property in goods, money and moveable estate; make a Will and sue for personal debts. In England he may be a mortgagee and recover his debt, where there is a positive prohibition to hold lands.

A particular legacy here, by the law of Scotland would be considered as a *pure bequest* of a sum of money and not of heritable property, which if made by a person in Scotland to a citizen here, the courts of law in that country will give effect to the legacy.

So where, as in this case, a particular legacy of \$100,000 is bequeathed by a citizen of Louisiana to establish a free school in his native town of Fochabers in Scotland, it being purely moveable in its nature, and independant in any manner of heritable property, must consequently be paid out of the estate, without any reference to any particular real estate.

This is an action to recover a legacy. The plaintiff Charles Gordon, Duke of Richmond and Lenox, superior and feudal lord of the burgh of barony and town of Fochabers, in the county of Moray, Scotland, and Alexander, Marquis, baron, bailie and sole magistrate, appointed by the Duke of Richmond for the administration of justice in said town of Fochabers, allege, that Alexander Milne also a native of said town, but for a great many years a resident of New-Orleans, died in October, 1838, leaving by his last will and testament a legacy of

\$100,000, which he bequeathed to his native town of Focha-  
 bers to be employed in establishing a free school, with suffi-  
 cient and competent teachers and supporting said school for  
 the use also of the parishes of Bellie and Ordifish.

EASTERN DIS.  
 March, 1841.  
 DUKE OF  
 RICHMOND ET AL  
 VS.  
 MILNE'S EXECU-  
 TORS ET AL.

The petitioners further show that by reason of their respec-  
 tive qualities and the powers specially conferred on them, and  
 particularly by a meeting of the inhabitants of the said town  
 and parishes, they are authorized to demand and receive the  
 legacy herein before mentioned, for the purposes of applying  
 it in conformity with the testamentary dispositions of the tes-  
 tator and donor; that they have duly appointed as their agents  
 and attornies in fact, jointly and severally, Wm. C. Mylne  
 and Murray M. Thompson to represent them, and to receive  
 on their account the amount of said legacy.

The petitioners pray that they may be recognized with full  
 power to receive said legacy; that the executors of the last  
 will and testament of Alexander Milne, deceased, and the  
 attorney for the absent heirs, be cited; and that they have  
 judgment in their behalf; and that said legacy be paid out of  
 the succession of the deceased, by the executors, to your pe-  
 titioner's agents.

*M. W. Hoffman*, attorney for absent heirs, excepted to the  
 petition on the ground that all the parties in interest were not  
 cited; that the Asylums for destitute orphan boys and girls  
 are legatees and not made parties. For answer, he says, the  
 deceased left brothers and sisters, or their decendants who  
 represent them, who are next of kin and heirs at law of the  
 said testator. He therefore avers that the petitioners are with-  
 out any capacity to take under said Will, and the bequest is  
 void for want of this capacity. He prays that the petition be  
 dismissed.

The executors answered, and said they admitted the testa-  
 mentary disposition, claimed in the petition, but required proof  
 of the authority of the petitioners to receive the amount of the



EASTERN Dis. said legacy. They submitted the question to the court  
March, 1841. whether the amount of the legacy should be paid as prayed

DUKE OF  
 RICHMOND ET AL

VS.  
 MILNE'S EXECU-  
 TORS ET AL.

for.

An amended petition being filed making the Asylums of the orphan boys and girls parties; they appeared by counsel and answering, said: Being universal legatees of Alexander Milne, deceased, they submitted to the court, whether under the laws of Louisiana, the petitioners being aliens, are entitled to and can receive the legacy in question; and if not, that their petition be dismissed.

Upon these pleadings and issues the cause was tried.

The principal question involved, is, are the donees or legatees capable and permitted by our laws to *take the legacy?*

The Judge of Probates says, "the only question at issue between the parties grows out of the proper construction to be given to the 1477th article of the Louisiana Code and the Scotch laws." The article of the Code in question says:—"Donations *inter vivos* and *mortis causa*, may be made in favor of a stranger when the laws of his country do not prohibit similar dispositions from being made in favor of a citizen of this state."

The Scottish law as laid down by professor Bell, in his "principles of the law of Scotland," No. 1641, says, "It is indispensable to the vesting of a succession in a particular person, 1st. that he shall be conceived at the opening of the succession and be born alive; 2d. legitimate; 3d. *that he shall be a subject of the King, &c.*" No. 1478, "Rights in land (whether property, security, or life-rent) made real by infeftment are *heritable*." No. 2135. "Aliens are incapable of acquiring heritage either by purchase or succession and cannot hold a lease. They may trade as freely as a subject and acquire property in goods, money and moveable estate; and may make a will and sue for personal debts."

The opinions of the Right Hon. Andrew Rutherford, Lord Advocate of Scotland, and of the Right Hon. Thomas Mait-

land, Solicitor General, were taken on the following statement and questions, produced in evidence.

EASTERN DIS.  
March, 1841.

There is laid before Her Majesty's Lord Advocate for Scotland:

DUKE OF  
RICHMOND ET AL  
VS.  
MILNE'S EXECU-  
TORS ET AL.

1. Printed copy of the will of the deceased, Alexander Milne.

2. Printed report of the decision of the Probate Court of the parish and city of New Orleans, finding that the bequest of a legacy of one hundred thousand dollars to the town of Fochabers is not good, on the ground that "the character of the legacy was a bequest of *heritable property*, within the province of the law of Scotland"—and that, "it was clear that a citizen of Louisiana could not have received a donation of the same kind left to him in Scotland."

1. "If by the law of Scotland, the legacy to the town of Fochabers is a bequest of heritable property?"

2. "If a person in Scotland had left to a citizen of Louisiana a donation of the same kind, would the courts of law in Scotland have found the citizen of Louisiana entitled to the legacy?" See case decided by the Court of Session, Fischer and others against the Earl of Seafield: 18th November, 1825.

*Lord Advocate Rutherford:*

1. It is very difficult to apply the law of Scotland to the construction of a foreign instrument, but as I read that instrument I should not consider the bequest in question as, in any sense of the word, a bequest, or rather *donatio mortis causa*, of *heritable* property. It appears simply a bequest of a sum of money.—The circumstance of that bequest being made in favor of a corporation in no respect alters its nature.—Farther, although by the law of Scotland, a party cannot affect his heritage by will, he may nevertheless affect it by a deed executed *mortis causa*; and if he conveyed heritable property to disponees or to his heirs, binding them to pay a sum of money to a third party, the sum so ordered to be paid to the

**EASTERN DIS.** third party, whether an individual or a corporation, would not  
March, 1841. be considered as an heritable subject, but would be taken as a  
**DUKE OF** legacy or bequest although paid by disponees or heirs taking  
**RICHMOND ET AL** an heritable subject, or paid out of the price of heritable sub-  
**VS.** jects which they might be under the necessity of selling in  
**MILNE'S EXECU-** order to implement the will of the testator.  
**TORS ET AL.**

2. In answering this query I have in great measure anticipated the second, which, as it appears to me, properly embraces the point on which this case turns. Although by the law of Scotland, a citizen of Louisiana could not, because an alien, hold heritable property in this country, either by purchase or succession, I have no doubt whatever, and consider it to be clearly the law, that if a Scotchman died, leaving to a citizen of Louisiana a sum of money payable out of personal estate, or payable out of real estate directed by him to be sold, or payable by the disponees in the *universitas* of his estate, heritable and moveable, such citizen of Louisiana would recover that sum in the courts of this country, and would recover it notwithstanding a deficiency in the personal estate to pay the testator's personal debts or preferable bequests, if there were any such. I do not feel myself entitled to speak of the instrument in question, but I am at a loss to see the principle upon which the bequests to the charitable institutions of the State, named as residuary legatees can be held preferable to the special bequests in favor of individuals, or in favor of corporations. If therefore there was personal property to answer the special bequests, we should in this country think those special bequests preferable to any bequest of residue, and indeed there can be no residue with us till the special bequests are satisfied; and the special bequests would be preferable though conceived in favor of an alien, and though directed to be vested by that alien legatee in the heritage of his own country. But even if there had not been sufficient *personal* property to pay all the bequests, I think there can be no doubt, by the law of Scotland, that under an instrument of this nature settling the *universitas* of

the maker's succession, it would have been no objection to a party claiming from the disponees payment of a sum of money, that he was an alien or bound on receiving it to invest it heritably in his own country.

*EASTERN DIS  
March, 1841.*  
*DUKE OF  
RICHMOND ET AL  
VS.  
MILNE'S EXECU-  
TORS ET AL.*

Upon the point of international law, especially as depending upon the Municipal law of Louisiana, it does not perhaps become me to express an opinion. But I cannot help adding, that assuming the principle of reciprocity which the Code of that State makes the basis of international law, there are no good grounds for the judgment which has been pronounced in the case now under consideration. The courts of this country in the converse case would not have pronounced that judgment. They would have given effect to the legacy in favor of the citizen of Louisiana.

*Solicitor General Maitland:*

I entirely concur in the opinion given by the Lord Advocate in this case and hold it to be very clear:

1. That if the legacy to the town of Fochabers had occurred in a Scottish instrument, it would, by the law of Scotland, have been a pure bequest of a sum of money, and not of heritable property.

And 2. That if a person in Scotland had bequeathed a legacy in similar terms to a citizen of Louisiana, the courts of law in Scotland, would, without hesitation, have given effect to the legacy.

There was judgment against the plaintiffs, and they appealed.

*Eustis & Th. Slidell*, for the plaintiffs and appellants:

1. That the town of Fochabers is incorporated by charter, and is represented by the plaintiffs, the Duke of Richmond, as the feudal lord, and Alexander Marquis, as baron bailie; they are consequently invested with full power to sue and recover the legacy now in contest. This is established by the record.

**EASTERN DIS.**  
**March, 1841.**

**DUKE OF  
RICHMOND ET AL  
VS.  
MILNE'S EXECU-  
TOR ET AL.**

2. It is shown that the legacy in question is of a sum of money, and that there are sufficient moveable effects of the succession to satisfy it. This is demonstrable by the inventory.

3. That by the laws of Louisiana, legacies are to be paid indifferently out of the real and personal estate of the testator; they are a charge on the whole estate and the heir on receiving it is bound to pay them. Louisiana Code, 1661 and seq., 1627.

4. Particular legacies must be paid in preference to all others even though they exhaust the whole estate, and interest is due thereon from the day of the demand. *Idem*, 1627, 16, 19.

5. Aliens may inherit and hold lands in Louisiana and there is no impediment or qualification to their succeeding by inheritance to intestate successions. *Philips vs. Rogers*, 5 Martin, 701.

6. The article 1477 of the Louisiana Code is confined exclusively to donations *inter vivos* and *mortis causâ*.

7. There can be nothing inferred from the laws of nations from which any general law can be implied prohibiting, restricting, or limiting testamentary dispositions in favor of foreigners. If there be any such prohibition or restriction in any particular case the party alleging it and seeking to annul a testamentary disposition by reason of it, must prove its existence clearly: the burthen of proof rests on him,

8. The heritable bonds of the Scottish law have no similarity with our obligations secured by mortgage: they are not mortgages, they are hypothecations and in Scotland would be strictly personal. *Erskine's Institutes*, 363, 602.

9. By the laws of Scotland a legacy of a sum of money in favor of a citizen of Louisiana would be valid. *Vide* opinions of Lord Advocate and other counsel.

10. The reason of the Scottish lands being heritable arises from the feudal tenure of the lands and of the necessity of the creditors being invested with or having a right to the seizin of the land which none but a subject can hold. *Bells' commen-*

taries, Nos. 1644, 1485, 1478, 1493. Erskin's Inst. 216, EASTERN DIS. March, 1841.  
222, 402.

11. The capacity of aliens by the law of England as well as of Scotland extends only to holding lands. There is no other limitation as to their holding any other property or acquiring it by purchase, devise or otherwise. Erskine, 972. Bell, 1644, 2135. 1 Blackstone commentaries, 272 and seq. 2 Kent's Com. 61.

12. By the law of England an alien may be a mortgagee and may receive his debt in countries where the prohibition to hold lands is positive. 1 Powell on mortgages 106.

13. There is no statute in Scotland concerning legacies, they are regulated by the civil law. 2 Kent's com. 61 and 62.

14. The legacy under consideration does not come within the prohibition of the act 1507 of the civil code. It is neither a substitute, nor a fidei commissum: a trust under the English law is neither one nor the other. 4 La. Rep. 213.

15. The Code itself recognizes the validity of bequests of this kind, they are not embraced in the prohibition of art. 1507. How are establishments of public utility to be kept up, how is the benefit intended to be secured to them unless through the instrumentality of administrators, agents or trustees? La. Code, 1536, 1543.

16. The provisions of the Code concerning usufruct of moveable property are closely assimilated to the species of property created under this bequest. Idem art. 556 and seq.

17. Legacies for objects of charity and public establishments being permitted by our laws and being privileged in the intention of the law, the form in which they are to be carried into effect is immaterial, the court will give the legacy such an effect as will be consistent with the intention of the testator and the public good. Domat, book 4, tit. 2, sec. 6. 7.

18. Hence it is inferred that there is nothing in the law of Scotland which would prevent a similar legacy from being valid if made in favor of a citizen of Louisiana; and that the

DUKE OF  
RICHMOND ET AL  
VS.  
MILNE'S EXECU-  
TORS ET AL.



EASTERN Dis. plaintiffs are of right entitled to receive the amount bequeath-  
March, 1841. ed to the town of Fochabers by the last Will of Alexander

DUKE OF  
 RICHMOND ET AL

VS.  
 MILNE'S EXECU-  
 TORS ET AL.

Milne, with interest, for which judgment is prayed.

*Hoffman*, for the absent heirs.

*L. C. Duncan*, for the Orphan Asylums.

*Canon*, for the executor.

*Simon, J.* delivered the opinion of the court:

This case arises out of the last will and testament of Alexander Milne, deceased, which contains the following disposition: "*Unto the town of Fochabers, (place of his nativity) I give and bequeath the sum of one hundred thousand dollars, to be employed in establishing a free school, with sufficient competent teachers, and supporting the said school, in the said town of Fochabers, for the use of the parishes of Bellie and Ordifish.*" The legacy is now claimed by Charles Gordon, Duke of Richmond and Lennox, superior as feudal lord of the burgh of barony and town of Fochabers; and by Alexander Marquis, baron bailie and sole magistrate for the administration of justice in said burgh of barony. They further allege that by virtue of the powers specially conferred upon Charles Gordon by a meeting of the inhabitants of the town of Fochabers duly convened, and at a meeting of the kirk session of the parish of Bellie, also duly convened, they are authorized to demand and receive the said legacy, for the purpose of applying the same in conformity with the said testamentary disposition; and that accordingly, they have appointed two agents and attornies in fact, to represent them in the premises, and to receive on their account the amount of the legacy. They pray to be recognized as the persons authorized to claim said legacy, and that the amount thereof be paid over to their said agents, &c.

The defendants, to wit: the three executors of the last will

of the deceased, the attorney appointed by the court to represent the absent heirs, the society for the relief of destitute orphan boys in the city of Lafayette, and the Poydras female asylum, joined issue by denying the capacity of the petitioners to take under the will; and by submitting to the court whether under the laws of Louisiana, the petitioners, being aliens, can be entitled to recover the legacy by them claimed for the purposes mentioned in the will.

The Court of Probates rejected the plaintiffs' demand, gave judgment in favor of the defendants, and said plaintiffs appealed.

Our attention has been called to two principal questions arising out of the denial of the plaintiffs' capacity to take under the will; and it is contended by the appellees:—1. That the town of Fochabers is not incorporated, and that therefore there is no person or corporation capable of receiving the legacy.

2. That under the laws of Louisiana, the plaintiffs, as foreigners, cannot take under the will, because the laws of Scotland prohibit similar dispositions from being made in favor of a citizen of Louisiana.

1. Fochabers is a *burgh of Barony* under the ducal family of Gordon, and governed by a bailie of his grace's appointment. *Chambers' Gazetteer of Scotland*, p. 437. It was incorporated as a burgh of barony by a royal charter of James the 6th, King of Scots, of the tenth of February, 1598, and forms one of a very large class which in Scotland are well known by the designation of *Burghs of Barony*. By the laws of Scotland, a burgh or barony is a *corporate body*, erected by the sovereign, and made up of the inhabitants of a determinate tract of ground, with jurisdiction annexed to it; they were erected by the sovereign either to be holden of himself or in favor of subjects who enjoyed the property or superiority of the lands contained in the charter; from this difference, arises the division of *Burghs royal*, and *Burghs of*

EASTERN DIS.  
March, 1841.

DUKE OF  
RICHMOND ET AL  
VS.  
MILNE'S EXECU-  
TORS ET AL.

EASTERN Dis. regality or Barony. *Erskine's instit. of the law of Scotland*,  
 March, 1841. *b. 1st., tit. 4, sec. 20 and 30.*—*The general law of incorpo-*

DUKE OF  
 RICHMOND ET AL  
 VS.  
 MILNE'S EXECU-  
 TORS ET AL.

*ration* applies to the Burghs of Barony, and they have power  
 to administer their common good, to elect officers, to make by-  
 laws, &c.; *Bell's principles of the law of Scotland*, No. 2191.

Under this system of laws, the incidents to a corporation are  
 these: 1. As a legal person the corporation has *persona stan-*  
*di in judicio*; it may sue or be sued, *grant and receive*, by  
 its corporate name, &c.: 4. It may purchase or hold lands, and  
 be infeffed by its corporate name and title; and 5. It has per-  
 petual succession, &c.; *Idem* No. 2169.—The power or au-  
 thority of the Duke of Richmond in regard to the burgh of  
 Fochabers, is acquired by inheritance, was originally derived  
 from the crown, and is constituted by the royal charter of  
 1598; it has a form of government and a local magistracy, and  
 the baron Bailie is the chief and sole magistrate of the burgh,  
 which office is now filled by Alexander Marquis, one of the  
 plaintiffs.—The evidence of distinguished jurists on the laws  
 of Scotland, has been taken on this particular subject, from  
 which it clearly appears that Burghs of Barony are proper  
*corporations*; and as such they are known and recognized in  
 the Scotch law; those corporations are accounted persons,  
 because they have their own proper stock, rights and privi-  
 leges as persons have, and as such are capable of receiving  
 and holding property either absolutely or in trust by their re-  
 presentatives. Under the law of Scotland, if a bequest similar  
 to the one in question had been made there by a will good in  
 point of form, it could be claimed on behalf of the town or  
 burgh of barony of Fochabers for the use of and in trust for  
 the said town, and parish of Bellie, including the lands of Or-  
 difish; and the same could be competently claimed by the  
 baron and the baron bailie to be held on behalf of the inhabi-  
 tants of the parish, including those of the town itself and the  
 lands of Ordifish. In such case, the baron and baron bailie  
 are empowered to act as trustees for the corporation, as they

are authorized to represent them in all circumstances where it may be necessary to claim or enforce their rights and privileges as a corporate body.—We must therefore conclude that the inhabitants of the town of Fochabers have a right to enjoy the privileges allowed them as a corporation, that as such they have capacity to receive by donations *inter vivos* or *mortis causa*, and that they are legally and properly represented in this suit by their trustees.

II. According to the 1477th art. of the Louisiana Code, "*Donations INTER VIVOS and MORTIS CAUSA may be made in favor of a stranger, when the laws of his country do not prohibit similar dispositions from being made in favor of a citizen of this state.*" This establishes a reciprocal right in favor of the citizens of the two countries, and it behooves us therefore to enquire first into the nature of the legacy under our laws—and 2d. to examine whether, under the laws of Scotland a similar bequest may be made in favor of a citizen of Louisiana.

1. The legacy made by Alexander Milne to the town of Fochabers, is one of a sum of money; and being a particular legacy, it ought to be discharged in preference to all others. *La. Code, art. 1627.* Being also a moveable legacy, it is to be paid out of the funds of the succession; but in default of such funds sufficient to discharge it, it is to be paid, as long as the estate is administered by the testamentary executors, indifferently out of the personal and real estate of the testator. It becomes a charge on the whole estate, and when the heir claims to be put in possession of the succession, and to take the seizin from the testamentary executor, he is bound to provide for the payment of the moveable or pecuniary legacies, by offering to put in the hands of the executor, a sum sufficient to satisfy them. *La. Code, arts. 1661, 1662, 1663 and 1664;* thus, such a legacy becomes a personal debt of the heir, which he must discharge as any other debt due by the succession, without any distinction being made whether it is

EASTERN DIS.  
March, 1841.

DUKE OF  
RICHMOND ET AL  
VS.  
MILNE'S EXECU-  
TORS ET AL.

The town of Fochabers, in Scotland, is a burgh of Barony under the ducal family of the Duke of Richmond, incorporated as such; has a right to enjoy the privileges allowed them as a corporation, and as such has capacity to receive by donations *inter vivos* or *mortis causa*, which right it can exercise by trustees.

A particular legacy is to be discharged in preference to all others, out of the funds of the succession; and in default of funds it is to be paid as long as the estate is administered by executors indifferently out of the personal and real estate, and becomes a charge on the whole estate; and descends to the heir as a personal debt when he takes possession. Interest is due thereon.

**EASTERN DIS.** to be satisfied out of his personal or real property; and interest is due thereon from the day of the demand. *La. Code,*

*March, 1841.*

**DUKE OF  
RICHMOND ET AL  
vs.  
MILNE'S EXECU-  
TORS ET AL.**

*art. 1619.* The legacy under consideration is therefore a simple pecuniary bequest which must be acquitted by the executors or by the heirs in the same manner as if it were a debt of the estate.

The capacity of aliens to transmit estates *ab intestato* and to inherit from others in Louisiana is granted; and there is nothing in the laws of this State that excludes aliens from the inheritance of any kind of property.

Before proceeding to examine the second question, it may be proper to remark that the provision contained in the *art. 1477* of our Code, is limited exclusively to the incapacity of receiving donations *inter vivos* and *mortis causa*, and that nothing in our laws shows that foreigners are excluded from the acquisition of real or personal property, by will or succession, and that they are not capable of inheriting either. *La.*

*Code, arts. 881, 882.* The capacity of aliens to transmit their estates *ab intestato* and to inherit from others in Louisiana, is on the contrary clearly shown by *the art. 945*, which declares

The incapacity of slaves *alone* are incapable of either; and as under the *art. 946*, the incapacity of heirs is not presumed, he who alleges it must prove it. There is therefore nothing in the laws of this state that excludes aliens from the inheritance of any kind of property.

2. The incapacity of aliens by the English and Scotch laws is only extended to their *holding lands or acquiring heritage*

either by purchase or succession. *Erskine's Inst., b. 3, tit. 10, sec. 10.; Bell, Nos. 1644, 2135; 1 Blackstone's Com., 272 and seq.; 2 Kent's Com., 61.* Under the laws of Scotland, an alien may acquire property in goods, money and moveable estate; make a will and sue for personal debts. In England he may be a mortgagee and recover his debt, where there is a positive prohibition to hold lands.

Under the laws of Scotland an alien may acquire property in goods, money and moveable estate; make a will and sue for personal debts. In England he may be a mortgagee and recover his debt, where there is a positive prohibition to hold lands.

The opinion of the Lord Advocate of Scotland and of the other jurists who have been examined on this subject, demonstrates clearly that if the legacy had occurred in a Scotch instrument,

it would, by the laws of Scotland, have been considered as a *pure bequest of a sum of money* and not of *heritable property*; EASTERN Dis.  
March, 1841.

and that if a person in Scotland had bequeathed a legacy in similar terms to one of our citizens the courts of law in that country would without hesitation give effect to the legacy. DUKE OF  
RICHMOND ET AL  
VS.  
MILNE'S EXECU-  
TORS ET AL.

The reason is drawn from the very expressions of the Scotch laws, and is very obvious: A legacy, in general, according to those laws, is defined to be a donation or bequest *mortis causa* of a sum, or subject, or *universitas*, to be paid or delivered by the executor out of the free moveable estate of the deceased, to a person named or plainly denominated; and a general legacy, or the *legatum quantitatis*, is a legacy not of a special article or debt, but indefinite, of so much *money*, or fungibles, or moveables of a particular description or class. *Bell, No. 1871, 1873.* In this case, the bequest is of a fixed sum of money, is

purely moveable in its nature, and is not one depending on, secured by or in any manner attached to heritable property; it must consequently be paid out of the estate, without any reference to any particular real estate, and under the Scotch laws would come within the definition of the *legatum quantitatis*. On this subject, the Lord Advocate informs us further, that although by the law of Scotland, an alien could not hold heritable property there, either by purchase or succession, there is no doubt that if a Scotchman died, leaving to a citizen of Louisiana, a sum of money payable out of personal estate, or out of real estate directed by him to be sold, or payable by the disponees in the *universitas* of his estate, heritable and moveable, such citizen would recover that sum in the courts of Scotland, notwithstanding a deficiency in the personal estate to pay the testator's personal debts or preferable bequests. These principles of the Scotch law, which are derived from the Roman or civil law, are very similar to ours. *La. Code, art. 1661.* They contemplate the payment of a pecuniary legacy in the same light as the payment of a debt due by the estate; it must be discharged; and the nature and the object of the legacy

A particular legacy here, by the law of Scotland would be considered as a *pure bequest* of a sum of money and not of heritable property, which if made by a person in Scotland to a citizen here, the courts of law in that country will give effect to the legacy.

So where, as in this case, a particular legacy of \$100,000 is bequeathed by a citizen of Louisiana to establish a free school in his native town of Fochabers in Scotland, it being purely moveable in its nature, and independent in any manner of heritable property, must consequently be paid out of the estate; without any reference to any particular real estate.



EASTERN DIS.  
March, 1841.

DUKE OF  
RICHMOND ET AL  
VS.  
MILNE'S EXECU-  
TORS ET AL.

being *alone* to be considered, the legatee cannot claim but the money, without his being entitled to exercise any right to or control over the heritable property, out of which the funds are to be raised to satisfy the bequest; if it be necessary to sell lands for the purpose of discharging such moveable legacies, *the price of such lands* so sold by the owner or by the executor *becomes moveable*, -and as such, must be applied to the payment of those legacies; although it cannot be said that such legacies are debts secured upon land, and of a heritable character. *Bell, No. 1478, 1479.* We have an instance of a bequest made by an English subject to the United States, the amount of which, of about *one hundred thousand pounds*, was regularly paid over to our government: It is the bequest made by James Smithson, of London, to the United States, for founding at Washington an establishment to be styled "the Smithsonian Institution for the increase and diffusion of knowledge among men." In December, 1835, the President of the United States transmitted to Congress a report from the Secretary of State, together with the papers and documents relative to said bequest; Congress acted upon the recommendation of the President, and a law was passed accordingly for the purpose of accepting the bequest and the trust. *See volume 2, document 25, 1st session, 24th Congress; vol. 9 Laws of the United States, p. 439.* We see no reason, therefore, why the same reciprocity should not be extended under the laws of Louisiana, to English and Scotch subjects, when it is clear that according to the laws of their country, our citizens would be entitled to recover similar legacies.

Much has been said however to convince us that the legacy is heritable in its nature and effect; and it has been urged that all that proceeds from immoveable property, is immoveable, and that any sum of money secured upon real property is a heritable bond: According to the Scotch laws, all subjects (things) which were immoveable by the Roman law, as a field or whatever is either part of the ground, or united to it, *fundo*

*annexum*, as minerals, houses, wells, &c., are heritable; and heritable objects are those which on the death of the proprietor, thus descend to the heir. *Erskine, b. 2, tit. 2, sec. 3 and 4. Bell, Nos. 1470, 1471, 1472.* Rights connected with or affecting lands, though not feudalized, are heritable; as servitudes, reversions, faculties and rights to challenge deeds relating to heritage. *Bell, No. 1485; Erskine, b. 2, tit. 2, sec. 5.* Thus, naked charters, or the disposition of the property or superiority of lands, or heritable bonds, though seizin has not proceeded on them, are heritable, because they are all rights of or securities upon land, and the proprietor or creditor may complete them by seizin, when he shall think proper. On the other hand, whatever has no resemblance to a feudal right, and produces no annual fruits, is moveable; by this rule, cash, jewels, &c., are all moveable subjects; all subjects bearing interest *ex lege*, are moveable in all respects; simple personal debts and engagements whether presently due or payable at a future term with interest, are moveable; as also *the price of lands sold* by the owner. *Erskine, b. 2, tit. 2, sec. 7 and 13. Bell, No. 1479.* The distinction is very clear and obvious, and it suffices to state that the reason of the Scottish bonds being heritable, originates evidently from the feudal tenure of the lands and from the creditors being invested with or having a right to the seizin of the land, which none but a subject can hold. *Bell, Nos. 1485, 1478, 1493 and 1644. Erskine, pp. 216, 222, 402.* In the present case, how could the legacy, if made in Scotland, be considered as a heritable bond? We have already demonstrated that the legatee has no right connected with or affecting lands, and less so is he entitled to be invested with the seizin of any land; the bequest does not carry with it any right of infestment (enfeoffment), its amount is to be paid in money out of the moveable estate of the deceased; it becomes the debt or personal obligation of the heir; he must satisfy it as any other debt, not only out of the funds of the succession, but, if necessary, out of any funds proceed-

EASTERN DIS.  
March, 1841.

DUKE OF  
RICHMOND ET AL  
VS.  
MILNE'S EXECU-  
TOR ET AL.

**EASTERN DIS** ing from the sale of property, either personal or real, to be  
**March, 1841.** sold or disposed of by the executors or by himself for that  
 purpose.

**DUKE OF**  
**RICHMOND ET AL**  
**vs.**  
**MILNE'S EXECU-**  
**TORSET AL.**

We think, therefore, that the doctrine of heritable bonds would not apply to the bequest in question, if made in Scotland; and that the judge *a quo* erred in not giving full effect to the legacy under consideration.

With regard to the interest allowed by law, from the day of the demand of the legacy, it cannot be included in our judgment, because it has not been claimed.

It is therefore ordered, adjudged and decreed that the judgment of the court of probates be annulled, avoided and reversed, and proceeding to give such judgment as, in our opinion, ought to have been rendered in the court below: it is ordered, adjudged and decreed that the plaintiffs be recognized as the persons duly authorized and entitled to claim and receive the legacy of *one hundred thousand dollars* mentioned in the last will and testament of Alexander Milne, deceased, as being made to the town of Fochabers; and that the amount thereof be paid over to plaintiffs' agents named in the petition, by the testamentary executors of the said last will and testament, with costs in both courts.



**DUKE OF RICHMOND, et al., vs. MILNE'S Executors, et al.**

ON A RE-HEARING IN PART.

When legal interest is the legal consequence of the debt or obligation without stipulation, a demand of the principal is a demand both of principal and interest; the one necessarily follows the other, even when the latter is not claimed in the petition.

So interest on a particular legacy is due from the day of demand of its delivery, **EASTERN DIS.** arising *ex mora*, depending on the lapse of time the legatee is deprived of the **March, 1841.** use of it; being a legal consequence of the debt or obligation and may be allowed without being specially claimed in the petition.

Interest is due on a legacy for a specific sum of money from judicial demand **vs. MILNE'S EXECU-** and follows as a legal consequence of the debt or principal obligation. **TORSET AL.**

*Eustis & Th. Shidell*, of counsel for the plaintiffs, obtained a re-hearing on the ground that interest had not been allowed on the amount of the legacy claimed from the time it was demanded. They argued as follows:

1. The court considers that interest cannot be included in the judgment because it was not claimed in the petition. The court is pleased to acknowledge the soundness of the principle that interest is due on a legacy like this, from the day of the demand. The provisions of the Code leave this beyond all question.

2. In every principle of equity the plaintiffs are entitled to interest. The succession was left without a debt—there were ample funds to pay it, and the residuary legatees and the absent heirs were, with the executors, their antagonist parties, resisting the payment of the legacy. The law and equity is in favor of the claim, its allowance then is a mere matter of practice.

3. A suit for interest which is due by the effect of law independently of the principal demand, would, to say the least, be an unusual proceeding.

The decision on this point, which was not made by the opposite counsel in argument, is believed to be contrary to the long established practice as settled by the decisions of this honorable court.

The article of the Code of Practice, No. 553, has received a construction which counsel was certainly justified in adopting.

4. In the case of Daquin and others *vs.* Coiron and others, reported in 8 Martin's Reports, N. S., p. 608, the rule of prac-

EASTERN DIS. tice on the subject was considered as established after an elaborate discussion by distinguished counsel. The court says:  
March, 1841.

DUKE OF  
RICHMOND ET AL  
VS.  
MILNE'S EXECU-  
TORS ET AL.

"The fourth point relates to the interest allowed by the judgment. It is objected that it was not claimed in the answer and that it was allowed on a sum not liquidated. The 553d article of the Code of Practice declares that interest shall not be allowed by the judgment unless the same has been expressly claimed, and then only in cases in which the law permits such interest to be stipulated.

5 "We do not understand this provision to apply to cases where the *interest is a legal consequence of the obligation*, on which suit is brought. It was made, as the last clause of the article shows, *for those cases where the payment of interest was stipulated and where interest could not be given without that stipulation.* In such cases, where the petition, or claim in reconvention, as the case may be, only asks for an execution of part of the contract, the judgment cannot go beyond the demand in the pleadings.

6. "But when the interest due, is a legal consequence of the debt, without any stipulation, *a demand of the principal is a demand of both principal and interest*; the one necessarily follows the other. The amount claimed here was sufficiently liquidated, and we do not see that in this part of the judgment any error was committed."

*L. C. Duncan*, for the Asylums and legatees, insisted that what is not demanded cannot be allowed; and not having amended the petition in time, the plaintiffs are now concluded.

*Hoffman*, for the absent heirs, was of opinion that it was now too late to demand interest.

*Canon*, for the executor, submitted the case to the court; the executor having no interest to oppose the execution of the will.

*Simon, J.* delivered the opinion of the court.

On the application of the plaintiffs' counsel, a re-hearing was granted on the sole question whether legal interest should be allowed on the amount of the legacy from the day of the judicial demand of its payment or delivery, although such interest was not claimed in the petition.

EASTERN DIS.  
March, 1841.

DUKE OF  
RICHMOND ET AL  
vs.  
MILNE'S EXECU-  
TORS ET AL.

This interest was disallowed in our first judgment, because the petition contained no prayer to that effect, but after an attentive and mature reconsideration of the question, we have been prompted to come to a different conclusion.

It is true that the *art. 553* of the Code of Practice provides that "interest shall not be allowed by the judgment, unless the same has been expressly claimed, and then, only in cases in which the law permits such interest to be stipulated."

But this article has received from this court in the case of *Duquin et al. vs. Coiron et al.*, 8 *Martin, N. S.* 608, the same construction which is contended for by the plaintiffs' counsel; and which he was clearly justified in adopting, when he instituted this action.—Our first impression was that this court had gone too far in establishing an exception to a rule which appears to be general in its terms; but from a closer examination, we feel convinced that its application ought to be limited to cases in which conventional or stipulated interest is sought to be recovered without having been demanded in the petition; with this view of the question, we are not disposed to deviate from the doctrine already established in our jurisprudence that "*when the interest is a legal consequence of the debt or obligation, without any stipulation, a demand for the principal, is a demand of both principal and interest; the one necessarily follows the other.*" Indeed, at the time that this suit was instituted for the recovery of the legacy, *no interest was due*; consequently it could not be considered as being any part of the demand which might either be remitted or abandoned; *C. of Pr. art. 156 and 157*; such interest was to accrue subsequently, subject to its amount being increased in proportion to the delay occasioned by the refusal of the executors

When legal interest is the legal consequence of the debt or obligation, a demand without stipulation, a demand of the principal is a demand of both of principal and interest; the one necessarily follows the other, even when the latter is not claimed in the petition.

So interest on a particular legacy is due from the day of demand of its delivery, arising *ex mora*, depending on the lapse of time the legatee is deprived of the use of it; being a legal consequence of the debt or obligation, and may be allowed without being specially claimed in the petition.



**EASTERN Dis.** to comply with the object of the principal demand; and the  
March, 1841.

**SANDEMAN**  
*vs.*  
**DEAKE & WIL-**  
**LARD.**

Interest is due  
 on a legacy for  
 a specific sum of  
 money from ju-  
 dicial demand,  
 and follows as a  
 legal conse-  
 quence of the  
 debt or princi-  
 pal obligation.

art. 1619 of the Louisiana Code says positively that "the particular legatee is entitled to claim the proceeds or interest of the thing bequeathed, from the day of the demand of its delivery, or from the day on which that delivery was voluntarily granted to him." This interest, arising *ex mora*, depends merely upon the lapse of time during which the legatee has been deprived of the use and enjoyment of the legacy after his demand; and we are satisfied that in such case, the interest being a legal consequence of the demand of the debt or obligation on which the suit is brought, it may be allowed without its being specially claimed or prayed for in the petition.—We conclude therefore that the plaintiffs are entitled to recover from the testamentary succession of Alexander Milne, deceased, five per cent. interest per annum on the amount of the legacy, from the day of the judicial demand thereof until paid; and that our first judgment ought to be amended accordingly.

It is therefore ordered, adjudged and decreed that in addition to our previous judgment, the plaintiffs do recover of the estate of Alexander Milne, deceased, five per cent. interest per annum on the amount of the legacy therein mentioned, from the day that the judicial demand thereof was made of the testamentary executors until paid.

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**SANDEMAN vs. DEAKE & WILLARD.**

APPEAL FROM THE COURT OF THE FIRST DISTRICT,

Affidavits of witnesses sworn to before the clerk, not in open court, do not constitute that proof which is required by law.

Clerks of courts have no authority, *out of the presence of the court*, to swear witnesses and take down their testimony in a cause. They are only to administer oaths in open court; and out of it in cases of arrest, attachment, provisional seizure, or generally in any conservatory measure required by one of the parties to a suit.

EASTERN DIS.  
March, 1841.

SANDEMAN  
VS.  
DEAKE & WIL-  
LARD.

Witnesses must be examined after issue joined, and give their testimony in open court, or it must be taken under a commission.

This is an action to recover the balance due on a lease. The plaintiff alleges that he leased to the defendants a house or store in Custom-house street, New Orleans, for one year, from the 1st November, 1838, to the 31st October, 1839, for \$700, upon which he received only \$175, leaving a balance of \$525 unpaid. That the defendants abandoned said lease about the middle of February, after its commencement and have removed their goods and furniture. This suit was instituted the 21st of February, and the plaintiff prays for a provisional seizure and judgment for the entire balance due or to become due on the lease.

There was judgment by default taken the 8th March, 1839. On the 13th, the plaintiff filed the testimony of two witnesses taken on affidavit, sworn to before the deputy clerk of the court. The District Judge on the filing of this testimony, confirmed the judgment for the sum claimed.

The defendant by counsel, now for the first time appeared, and moved for a new trial on the ground that they had a good defence; were taken by surprise; that the testimony was improperly taken on which judgment was confirmed; not having been taken under a commission or in open court, but on *ex parte* affidavits. The motion for a new trial was overruled and the defendants appealed.

*Grivot*, for the plaintiff and appellee, maintained the following points:

1. The lessor, when the lessee abandons the premises and violates his lease, has the right by law to institute his action and recover judgment for the amount due and to become due;

EASTERN DIS. the testimony shows that defendants leased the store for the  
March, 1841. term of one year, and the amount of rent to be paid for the  
SANDEMAN use and occupation of said store ; and that they abandoned the  
vs. premises in the month of February. The law obliges them  
DEAKE & WIL- to the whole amount of their contract. See *Christy vs. Caze-*  
LARD. *nave*, 2 Martin, N. S., 451, and *Reynolds vs. Swain*, 13 La.  
 Rep., 197, and the authorities cited in the two cases.

2. This is not an action of damages, but one for rent justly due, and defendants not having made a defence nor prayed for a jury, the art. 313 of the Code of Practice does not apply. The testimony offered by plaintiff is full, complete and satisfactory and shows the claim to be well founded.

3. The new trial was properly refused, no ground was shown to obtain it. The laches or negligence of counsel is not a sufficient ground for a new trial. 7 La. Rep., 252; art. 360 Code of Practice. Nor can a judgment by default confirmed be opened, in order to allow a defence to be made to the merits.

4. Objections to the testimony given by plaintiff to establish his claim, came too late and could not be heard on a motion for a new trial.

5. The proceedings were regular, and the delays of the law which are granted to defendants, were fully allowed in this case, and the defendants have no right to complain. See Record.

*I. W. Smith*, for the defendants:

1. This is an action on a breach of the contract of lease. The judgment which the plaintiff has obtained is one of damages. It was illegally rendered without a jury being summoned to assess them. C. Pr., 313.

2. The plaintiff did not prove before the court below that his demand was well founded. C. P., 312.

3. There was no evidence that the property seized was subject to the privilege of said plaintiff.

4. The judgment was rendered for a sum of money not then due. EASTERN Dis.  
March, 1841.

SANDEMAN

VS.

DEAKE & WIL-  
LARD.

*Morphy, J.* delivered the opinion of the court.

Plaintiff claims \$525, being a balance due for one year's rent of a store, payable by monthly instalments; the defendants having abandoned the premises before the expiration of the lease. A provisional seizure was taken on goods removed to another store, which defendants occupied on leaving that of the plaintiff. No answer having been filed, a judgment by default was entered, which was made final after the legal delays. A motion to set aside this judgment having been overruled, defendants appealed.

Several points have been made in this court by the appellants. The opinion we have formed on one of them renders the examination of the others superfluous. They contend that the plaintiff did not prove his demand according to article 312 of the Code of Practice, when he obtained a confirmation of the judgment by default.

The record shows that no witnesses were examined either in open court, or under a commission taken for that purpose. Two affidavits were filed in the case, purporting to have been sworn to and subscribed before P. Le Blanc, the deputy clerk of the court. Admitting that these affidavits were laid before the judge when the judgment was made final, they do not, in our opinion, constitute that proof which was intended and is required by the Code. Clerks of courts have no authority out of the presence of the court to swear witnesses and take down their testimony in a cause. They are only authorized to administer all oaths required to be taken in cases of arrest, attachment, provisional seizure, &c.; and generally whenever any conservatory measure is asked for by one of the parties. 1 Moreau's Dig., 228, sec. 5. When issue is joined in a cause, either expressly by an answer being filed, or tacitly by a judge-

Affidavits of witnesses sworn to before the clerk, not in open court, do not constitute that proof which is required by law.

Clerks of courts have no authority out of the presence of the court to swear witnesses and take down their testimony in a cause. They are only to administer oaths in open court, and out of it in cases of arrest, attachment, provisional seizure; or, generally in any conservatory measure required by one of the parties to a suit.

Witnesses must be examined, after issue joined, and give their testimony in open court, or it must be taken under a commission.

EASTERN Dis. ment by default being entered ; every witness examined must  
March, 1841. give his testimony in open court or it must be taken under a

NETTLES  
 vs.  
 SCOTT.

commission. We are not aware of any good reason why the law should not be complied with in both cases. C. of Pr. art. 360, 478 and 427. No legal proof of the plaintiff's demand having been made, the judgment by default was wrongfully confirmed.

It is therefore ordered that the final judgment rendered by the District Court be reversed, and that this case be remanded for further proceedings, the appellee paying the costs of this appeal.

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NETTLES vs. SCOTT.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF EAST  
 FELICIANA, THE JUDGE OF THE EIGHTH PRESIDING.

The defendant contracted under a penalty to buy the plaintiff's plantation for a certain sum, payable in a year, but to be discharged on the vendor's obtaining a loan from bank on mortgage of the premises, by the vendee's taking his place: *Held*, that as soon as the loan was obtained, the purchaser became *liable to the penalty*, on failing to take his vendor's place as debtor to the bank:

A notary may be employed as agent of the party to give *notice in writing*, as the second mode under the Code of putting the adverse party in default.

The interest stipulated on the price of a plantation, will be considered as a yearly sum for its use and occupation, when the party or vendee is put in possession, independent of any damages or the penalty, the party may become liable for, on non-compliance with the terms of sale.

The party dissatisfied with the verdict of a jury is expressly allowed three days in which to move for and obtain a new trial; but he may waive this right; and he will be considered as having waived it, when he neglects to avail himself of it. Having done so he cannot claim relief in this court, especially when he opposed the adverse party's attempt to obtain a new trial.

70V 410  
 192R 446

It is different in relation to new trials asked for, from *the court*. The party may well imagine he cannot change the decision, when he has no new argument to offer the same judge who rendered the first judgment.

EASTERN DIS.  
March, 1841.

NETTLES  
VS.  
SCOTT.

This is an action to recover the sum of \$1000, the penalty stipulated in a contract of sale in case of non-compliance, and ten per cent. per annum on the amount or value for the time the plaintiff was kept out of the price and use of his plantation. The suit is instituted on a written contract or agreement, the material parts of which are as follow :

“ And the said James Nettles acknowledges he has made a contract of sale of land, (or plantation,) containing about 400 acres, for the price and sum of \$5000, which was to be paid in cash, and that he gave possession of said land to said James Scott *in February last*, but has not made a title to him ; having previously offered the same to be mortgaged to the Union Bank for a loan ; and the money not having been obtained from the bank, it still stands offered and will be mortgaged if the money is obtained : And should he mortgage the land he will make the title ; or if he should not, then he will execute a title at any time that he, the said Scott, calls for it and pays him the money. And the said James Scott acknowledges that he has made a contract with James Nettles, by which he is to give the said Nettles \$5000 cash for the tract of land above mentioned : Further acknowledges that he has possession of said land, and has the tillible part in cultivation ; and if the said Nettles should mortgage said land to the bank, that he will receive the title from said Nettles with that incumbrance ; and that he will make the payments in the bank as they fall due to the amount of \$5000, in the payment for said land. And should he not get the money out of the bank, that the said Scott agrees to make said payment to said Nettles and take the title within twelve months from this date : And further that as he is cultivating the land, he will pay ten per cent. interest on the amount of \$5000, from the 15th day of February, 1836, until the title is executed and the money paid. And further, the



EASTERN Dis. said James Scott agrees and consents that should he fail to  
March, 1841. comply on his part that he forfeits and agrees to pay to the  
NETTLES said James Nettles the sum of one thousand dollars," &c. &c.  
vs.

SCOTT.

"Signed, &c., this 16th day of April, 1836.

"JAMES NETTLES.

"JAMES A. SCOTT."

"Witness—

"M. SIMPSON,

"J. D. COLEMAN."

The plaintiff alleges that he succeeded in obtaining money on this mortgage; and on the 27th January, 1837, notified said Scott that he was then ready to make the title to him and to comply with his part of the contract in every respect, and appointed a day for the purpose of meeting said Scott to comply with their contract, and did appear and was ready as he has always been, to comply, but that the defendant, Scott, failed to attend or to comply with his said contract in any respect although he has been legally notified and put in default. He prays judgment for the sum of \$1000, and for interest at the rate of ten per cent. per annum on \$5000, or the price of his plantation, from the 26th February, 1836, until Scott shall comply with his said agreement.

The defendant excepted to the plaintiff's right of action, and averred that he could not maintain the suit because being sued on a penal obligation, he had never been put in default on the principal obligation. For answer to the merits he pleaded a general denial and prayed that the suit be dismissed.

On these pleadings and issues the cause was tried.

The plaintiff offered in evidence the contract or agreement sued on; and also a Notary Public as a witness and a letter written by the Notary at his instance, notifying the defendant that the plaintiff had obtained the loan from Bank in the manner agreed on; that he was ready to make a title and comply with the terms of their agreement according to the stipulations therein contained.

The cause was submitted to a jury who returned a verdict in favor of the plaintiff for \$1000 as damages set forth in the contract. EASTERN DIS.  
March, 1841.

NETTLES  
VS.  
SCOTT.

The defendant made a strenuous effort to obtain a new trial, which was overruled, and he appealed from judgment confirming the verdict.

*Andrews*, for the plaintiff, prayed that the judgment be amended so as to allow the plaintiff his ten per cent. on the price of the plantation, or sum of \$5000, from 26th February, 1836. In all other respects the judgment is correct.

*Muse*, for the defendant, insisted on the reversal of the judgment:

1. The *term* allowed by the contract (which forms the subject of the contract) had not *elapsed* when the plaintiff, *Nettles*, attempted to put the defendant, *Scott*, *in mora*. See the following authorities: La. Code, arts. 2048, 2052 and 2113.

2. The proceedings resorted to by the plaintiff before the Notary Public *were informal* and insufficient to put the defendant *in mora*, admitting that the term had elapsed. 6 Martin, N. S., 229 and 623.

3. The penal obligation now sought to be enforced and on which the judgment appealed from was rendered, is *grossly* and *glaringly* usurious and as such ought not to be enforced by this honorable court. See the contract and the following authorities, 7 La. Rep., 188, 209; 3 idem, 391; La. Code, arts. 2113, 2121, 1929.

*Martin, J.* delivered the opinion of the court.

The defendant is appellant from a judgment by which the plaintiff has recovered the penalty of one thousand dollars, for the breach of a contract, for the purchase of a plantation from the latter. The appellee has prayed the amendment of the

EASTERN DIS. judgment, so far as it disallows his claim under the contract, to  
March, 1841. a yearly sum of five hundred dollars or ten per cent. on the

NETTLES  
 vs.  
 SCOTT.

price of the plantation for its occupation and use.

The dismissal of the appeal has been prayed for on several grounds, neither of which we have considered, because the conclusion at which we have arrived on the merits, is more favorable to the appellee than the dismissal of the appeal.

1. The counsel for the appellant has contended, that *the term* allowed by the contract had not elapsed when the plaintiff attempted to put the defendant *in morá*.

2. The proceedings resorted to by the plaintiff before the notary, were informal and insufficient to put the defendant *in morá*; admitting the term had elapsed.

3. The penal obligation now sought to be enforced and on which the judgment was rendered, is grossly *usurious*.

The defendant contracted under a penalty to buy the plaintiff's plantation for a certain sum, payable in a year, but to be discharged on the vendor's obtaining a loan from bank on mortgage of the premises, by the vendee's taking his place: *Held*, that as soon as the loan was obtained, the purchaser became liable to the penalty, on failing to take his vendor's place as debtor to the bank.

I. By the contract the defendant bound himself to purchase the plantation of the plaintiff for the sum of five thousand dollars, to be discharged in case the plaintiff obtained from the Union Bank a loan of money on a mortgage of the premises, by the defendant taking his place as debtor of the Bank. The loan was obtained and the defendant, in our opinion, became thereby bound to relieve the plaintiff from his responsibility to the Bank, as soon as he was informed that the loan had been granted, and requested to take the plaintiff's place. It is true that in the event of the plaintiff's failing to take the loan, the defendant had one year within which he should pay the price. His counsel has contended that this delay of a year, extended to the first hypothethis. It does not appear to us that the District Court erred in coming to a different conclusion.

II. The law provides that a party to a contract may be put *in morá*, by the other in several ways: 1. By a suit: 2. By a demand in writing: 3. By a protest: 4. Verbally in the presence of two witnesses. The plaintiff in this case seems to have resorted to the second mode of putting his adversary *in morá*, to wit: by writing. He was not bound to give the

written notice in person, and he employed as his agent for this purpose the notary in whose office the act of sale was intended to be passed. The defendant did not object to this mode of notice, but replied, "that he would attend on the day mentioned." The written notice given by the notary was not an official act but had to be proved by witnesses and was so proved. The defendant was therefore properly put *in mora*, by a demand in writing; being one of the modes pointed out by law. La. Code, art. 1905. No. 2.

III. There was no usury in the contract. The defendant was put in immediate possession of the premises and engaged to pay a yearly sum for the use and occupation of the plantation. This payment was independent of the price or consideration of the sale, and of any damage or penalty to which he might become liable on his neglect and refusal to comply with any other terms of the contract; and would have been demandable, even if both parties had afterwards agreed not to carry the sale into effect. It was no part of the penalty stipulated.

In asking to have the judgment amended by allowing him the yearly rent, or sum stipulated for the use and occupation of the land, the appellees' counsel has expressed his doubt of our ability to accede to his request "*inasmuch as the case was tried by a jury.*"

The party who is dissatisfied with the verdict of a jury, has, by an express provision of the Code of Practice, an opportunity of obtaining relief by a motion for a new trial within three days after the verdict is given, and judgment rendered thereon. C. Pr. art. 558. This however, being introduced for the exclusive benefit of the party aggrieved, he is perfectly at liberty to waive it; and he cannot complain if he is considered as having waived it, when he neglects to avail himself of it within the time or period fixed by law.

In this case the plaintiff not only declined the means of obtaining below, what he claims now at our hands; but by opposing the defendant's attempt to obtain a new trial he de-

EASTERN DIS.  
March, 1841.

NETTLES  
VS.  
SCOTT.

A notary may be employed as agent of the party to give notice in writing, as the second mode under the Code of putting the adverse party in default.

The interest stipulated on the price of a plantation, will be considered as a yearly sum for its use and occupation, when the party or vendee is put in possession, independent of any damages or the penalty, the party may become liable for, on non-compliance with the terms of sale.

The party dissatisfied with the verdict of a jury is expressly allowed three days in which to move for and obtain a new trial; but he may waive this right; and he will be considered as having waived it, when he neglects to avail himself of it. Having done so he cannot claim relief in this court, especially when he opposed the adverse party's attempt to obtain a new trial.

**EASTERN Dis.** privied himself of the means of obtaining the relief which he seeks. What we have just said will not we hope, be extended

*March, 1841.*

**POLICE JURY OF  
IBERVILLE**

*vs.*

**SHERBURNE ET  
AL.**

to the omission to ask a new trial in a case *not tried* by a jury.

The party who is dissatisfied with the decision of the court may well imagine that it is not worth his while to attempt to convince the Judge of his error, when he has no new argument to offer.

It is different in relation to new trials asked for, from the court. The party may well imagine he cannot change the decision, when he has no new argument to offer the same Judge, who rendered the first judgment.

When a verdict is set aside the case must necessarily be submitted to a new jury, in which none of the first jury can be placed: Besides, there are various reasons that will induce this court to refrain from opposing the verdict of the jury, which have no force when applied to the decision of the court. The members of this court cheerfully disown individual superiority of any kind over the gentlemen presiding in the other courts; but this tribunal, has from its numbers and situation, a considerable advantage over the inferior courts of the state to examine and decide on cases brought before it on appeal.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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**POLICE JURY OF IBERVILLE vs. SHERBURNE ET AL.**

APPEAL FROM THE COURT OF THE FOURTH DISTRICT FOR THE PARISH OF IBERVILLE,

THE JUDGE OF THE DISTRICT PRESIDING.

The article 2257 of the Code requiring contracts for sums exceeding 500 dollars, to be proved by more than one witness, relates to *verbal* and *not* written obligations or contracts.

The signatures to a sheriff's bond executed and acknowledged before the Parish Judge need not be proved, to admit it in evidence.

The Parish Treasurer is a competent witness for the parish in a suit by the Police Jury against the sheriff for the parish taxes. EASTERN Dis.  
March, 1841.

In a suit on the sheriff's bond to recover from him and his securities the balance of the parish taxes due, it is not required to put the parties in default; not even to recover the penalty. POLICE JURY OF  
IBERVILLE  
VS.  
SHERBURNE ET  
AL.

This is an action by the Police Jury of the parish of Iberville to recover the sum of \$3,947 from the defendant, being the balance due of the parish taxes for the year 1837.

The plaintiffs show that the defendant, Sherburne, gave bond with security for the faithful performance of his duties as sheriff of the parish of Iberville, and that he was to collect and account for all taxes of the state and parish. They allege that he has failed to collect and pay over the balance above stated, of the parish taxes, and that thereby the condition of the bond is broken. They pray judgment for this sum.

The principal defendant pleaded a general denial; he denied specially that he was responsible for the parish taxes; that there was no cause of action and that he is not indebted as is alleged.

The plaintiffs offered the sheriff's bond in evidence, and the parish assessment roll under which the taxes were collected and proved the demand, and had judgment. The defendants appealed.

*Edwards*, for the plaintiffs, insisted on the affirmance of the judgment, as being fully established by the evidence.

*Labauve*, contra, urged various arguments to show that the judgment was erroneous and should be reversed.

*Garland J.* delivered the opinion of the court.

This suit is instituted on a bond executed by Sherburne, the late Sheriff of the parish of Iberville, and his sureties, to the Governor of the State, the conditions of which among other things specifies, "the said Sheriff by himself or deputies shall faithfully collect and account for all taxes of the State, and pa-



**EASTERN DIS** risk of Iberville for the year 1837, agreeably to law." This  
**March, 1841.** bond was accepted by the parish judge and justices of the  
**POLICE JURY OF** peace, as required by the act of the Legislature.  
**IBERVILLE**

**vs.**  
**SHERBURNE ET**  
**AL.**

The Police Jury by an ordinance directed a tax to be laid and collected of seventy-five cents on every slave and one dollar on every thousand dollars value of real property in said parish, agreeably to the assessment roll of the state tax, and further directed the clerk to make out a list of said taxes in conformity to the ordinance and deliver the same to the Sheriff for collection. The clerk made out the list and delivered it, the Sheriff proceeded to collect the tax, and paid a portion of it to the parish treasurer. This suit is brought to recover the balance. The Sheriff and his sureties say the plaintiffs cannot maintain the action; that they are not responsible in this suit and deny generally the justice of the demand.

On the trial, the plaintiffs offered in evidence the bond executed by the Sheriff and his sureties, after having proved its

The article 2257 of the Code requiring contracts for sums exceeding 500 dollars, to be proved by more than one witness, relates to verbal and not written obligations or contracts: execution by a witness who swore to the signatures. To its reception the defendant objected "on the ground it was not properly, sufficiently and legally proved." The objection is so generally set forth, it is necessary to refer to the arguments of the counsel to understand its force, and from them we learn, he relies upon the position that as the sum demanded exceeds five hundred dollars, the contract must be proved by more than one witness. The article 2257 of the Code, which he cites, establishes the opposite position to the one for which he contends.

The signatures to a sheriff's bond executed and acknowledged before the Parish Judge need not be proved, to admit it in evidence. The article relates exclusively to contracts not reduced to writing, and the cases cited are to the same point. We think there is not the slightest foundation for the objection. The bond was in fact executed and acknowledged before the parish judge, and it was not necessary to prove the signatures.

The objection to the admission of Hebert as a witness is not stronger than that to reading the bond. The objection of the defendant to his testimony is quite a novelty. He is the parish treasurer, and nominally a party to the suit, and all his testi-

mony, with a single exception, (which is proved by another witness,) is an admission that the defendant, Sherburne, had paid a part of the sum for which he and his sureties were responsible.

**EASTERN DIS.**  
**March, 1841.**  
**POLICE JURY OF**  
**IBERVILLE**  
**VS.**  
**SHERBURNE ET**  
**AL.**

The defendants further say there is no evidence of the amount of the parish taxes, or that the evidence is incomplete, because the assessment roll made to collect the State tax is not produced. That is no concern of the defendant. The Police Jury directed their clerk to use this assessment in making out the roll from which the parish taxes were to be collected. It was used for information and served as the basis of their assessment, but the Sheriff was directed to collect the parish taxes from the roll furnished him by the order of the Police Jury. It is too late for him to object to that roll after he has received it and collected the taxes on it. If it were incorrect or illegal, the objection should have been made before the money was taken out of the pockets of the people of the parish by virtue of it.

The Parish Treasurer is a competent witness for the parish in a suit by the Police Jury against the sheriff for the parish taxes.

But the ground of defence most relied on by the defendants is that the bond is a "penal and conditional obligation" and that as the suit is to recover a portion of the penalty, the defendants must be put in default, in one of the modes pointed out by art. 915 of the Code, and proof of it is a condition precedent to a recovery. It is true the bond has a penalty, but the plaintiffs do not sue to recover it or any damages, resulting from a failure to collect the taxes: the suit is to recover the money actually received and no more. But if the suit was for the whole penalty, the defendants have not shown that it is necessary to put public officers in default, when suits are instituted for violations of official duty and obligations. The Sheriff is *ex officio* the collector of parish taxes, and as responsible for them as he is for taxes due the State; and if it were necessary to put him in default before they could be recovered, we think he is so by operation of law, as soon as he fails to perform the duty imposed by the law. Not only is a Sheriff or tax collec-

In a suit on the sheriff's bond to recover from him and his securities the balance of the parish taxes due, it is not required to put the parties in default; not even to recover the penalty.

**EASTERN DIS.** tor responsible for the money he collects for the State, but by  
*March, 1841.*

**FARRAR**  
*vs.*  
**NEWPORT ET AL.** the constitution he is ineligible to a seat in the Legislature and  
 subject to other penalties by statute. We therefore think a  
 violation of law and duty so flagrant, is equivalent to a default  
 and a recovery may be had without proof of an actual demand  
 to pay the money; La. Code, art. 1905. Whether the case  
 might not have been different, if the Police Jury had appointed  
 some other person than the Sheriff to collect the taxes, it is not  
 necessary to decide.

The judgment of the District Court is therefore affirmed  
 with costs.

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**FARRAR vs. NEWPORT ET AL.**

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF WEST FELICIANA.

In an action of partition the omission of some of the defendants to appeal cannot  
 affect the right of the others to do so.

But where one of several defendants in a judgment decreeing a partition, ap-  
 peals, he must make all his co-defendants appellees or parties, as well as the  
 plaintiff, or the appeal will be dismissed.

This is an action of partition. The plaintiff alleges he is a  
 co-proprietor and owner of one undivided third part of a tract  
 of land; and that Newport and wife, and Sarah Young, Ann  
 F. Young and husband, and Sarah Eliza Young, a minor, are  
 all interested and co-proprietors of the other two-thirds, and  
 that it is necessary to have a sale in order to effect a partition.

The defendants were all made parties and one of them joined  
 in the prayer for a partition. Separate answers were put

in by the others, and various matters set up against the partition as demanded.

EASTERN DIS.  
March, 1841.

There was judgment decreeing a partition by licitation or sale of the land in question on a credit of one, two and three years, and the notes of the purchasers to be divided among the parties, so that the plaintiff and one of the heirs or defendants joining in the petition be allowed their shares out of them. The defendants, Newport and wife, alone appealed. The appeal was taken against the plaintiff and appellee alone, and bond given accordingly.

FARRAR  
VS.  
NEWPORT ET AL.

*Patterson*, for the plaintiff, moved to dismiss the appeal for want of proper parties, and that all the other parties to the suit were not cited and made appellees.

*Boyle & Lyons*, for the appellant.

*Simon, J.* delivered the opinion of the court:

This is an action of partition. Plaintiff, as vendee of two of the heirs and legatees of Robert Young, who left six children, represents himself to be the owner in common with all the other heirs of the deceased, (four in number,) of one undivided third of a tract of land belonging to and proceeding from the succession of his vendor's father. He prays that the said tract be sold, and that the proceeds thereof be partitioned among the co-proprietors according to their respective rights thereto.

The four defendants were all legally cited; one of them joined the plaintiff in praying for a partition, two of the others joined issue by denying plaintiff's right of action and pleading other matters in avoidance; and the fourth defendant, wife of Newport, having failed to file an answer, a judgment by default was taken against both husband and wife. The case was regularly tried, and the court of probates having rendered a judgment of partition and ordered the sale of the property

**EASTERN DIS.** according to the plaintiff's petition, defendant, Newport took March, 1841. the present appeal.

**FARRAR**  
**VS.**  
**NEWPORT ET AL.** A dismissal of the appeal has been prayed, on the grounds that all the co-proprietors of the property sought to be partitioned are not before this court; that only one of the defendants has appealed, and that this court cannot proceed to reverse a judgment of partition, in the absence of some of the parties thereto.

We are of opinion the appeal ought to be dismissed :

In an action of partition the omission of some of the defendants to appeal cannot affect the right of the others to do so. *Burke vs. Erwin's heirs*; 6 *La. Rep.* 323. We are not ready to controvert this rule, which, on the contrary, appears to us to be a proper and safe one to adopt for the protection of the rights of suitors who, thinking themselves aggrieved by a judgment, would sometimes be without remedy, if their right to appeal was to depend upon the will and disposition of their co-defendants: but in a case of partition, which, from its nature, requires the presence of all the interested parties, of all the co-proprietors of the property sought to be divided, *La. Code, arts. 1230, 1231, 1234, 1246.—Code of Practice, arts. 1024, 1025.*—We are unable to conceive how we could, in the absence of some of the *co-partageants*, inquire into, revise or modify a judgment ordering a partition of the common property.

Suppose, in this case, we should be of opinion that the decree of partition appealed from by Newport, ought to be modified so as to order the property to be divided in kind and not by a sale; our judgment would present the singular anomaly of directing the division in kind as between the appellant and appellee, whilst with regard to the other co-proprietors, who would be satisfied with the result of the case in the court below, the judgment of the lower tribunal, ordering it to be made by a sale, would be acquiesced in and would acquire the force and effect of *Res judicata*. It seems to us

But where one of several defendants in a judgment decreeing a partition, appeals, he must make all his co-defendants appellees or parties as well as the plaintiff, or the appeal will be dismissed.

that the proper course to have been pursued in this case by the appellant, should have been to cite his co-defendants as appellees before this court, if they refused to join him in the appeal. Having not done so, his appeal must be dismissed.

It is therefore ordered and decreed that the appeal be dismissed at the costs of the appellant.

EASTERN DIS.  
March, 1841.

ZERINGUE  
vs.  
HARANG'S  
ADMINISTRATOR

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**ZERINGUE vs. HARANG'S Administrator.**

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

An action of boundary lies not only where two contiguous estates have never been separated, but also when the old boundary is effaced and can no longer be seen.

Where vestiges of the ancient boundary between two plantations are to be seen, new posts should be fixed, but they must be placed where the former limit or fence stood, without regard merely to the title papers.

Although one cannot prescribe against his own title he can prescribe beyond it; and claim more land than his title calls for if he has had uninterrupted possession of the surplus a sufficient length of time.

No appeal lies from a decision of the court referring a case of boundary back to the surveyors appointed, with instructions to search for and run out a particular boundary line, referred to.

This is an action of boundary. The plaintiff alleges that no boundary line exists between his estate, and that belonging to the succession of Alexander Harang, deceased; that he has long been desirous of having the boundary between them established on its true basis according to the title papers; and for this purpose he applied to Louis Fazende the administrator of said succession, but in vain. He prays that the defendant be cited and that in pursuance of the La. Code, article 837, one or more surveyors be appointed to inspect the premises, run



EASTERN DIS. the lines and report to the court; and that he have judgment  
March, 1841. fixing his true boundary.

ZERINGUE  
VS.  
HARANG'S  
ADMINISTRATOR

The defendant for answer said there are and always were, at least for a great many years past, boundary posts between the two plantations in question. Damarin's executors who had purchased part of Harang's estate, were also made parties defendant.

Two surveyors were appointed to run out the lines and report to the court. They did so, but in consequence of the written testimony of Judge Dugue who had been born and raised on the Harang estate, the case was referred back to the surveyors to run out an ancient boundary line described by Judge Dugue in his testimony. From the order of court thus made, the plaintiff appealed.

*J. Seghers*, for the plaintiff.

*Denis*, for defendant.

*Roselius*, for Damarin's executors, called in to defend.

*Morphy, J.* delivered the opinion of the court.

This is an action of boundary; the petitioner alleges that his plantation is contiguous to that belonging to the succession of the late Alexander Harang, and that being desirous to have the limits ascertained, he has in vain requested defendant, who is the administrator of the estate, to permit the common boundary line to be determined by a sworn surveyor, but that he has refused so to do, and has made opposition to the fixing of any boundaries. In answer, the defendant avers that there are and always have been for a great number of years back, boundary posts between the two plantations in question.

The court below appointed two surveyors to survey the plantations and fix limits between them, after giving notice to the parties of the time of said survey, and reserved to the latter all legal exceptions to the survey when made. The surveyors

reported that there existed no boundary posts separating the two plantations in their present state, and that they were proceeding to fix the limits when they met with a difficulty in relation to the respective extent (*contenance*) of the two tracts of land; that it appeared that although Foucher, the vendor of Alex. Harang, had in reality sold to him in 1810, only 12 arpents and 20 toises, there was found to be after the sale 13 arpents, 14 toises and 5 feet, according to a survey made in 1814, which they had not seen but which they were acquainted with from its being mentioned in a petition presented to the court in the case of *Foucher vs. Harang*; that thus the plantation of Alexander Harang appeared to have a surplus of land of 24 toises and 5 feet, which is about the quantity claimed by Camille Zeringue; that not having before them either the process verbal of this survey or any title giving to Harang's plantation 13 arpents, 14 toises and 5 feet instead of 12 arpents and 20 toises, they have thought it best to refer the matter to the court for it to determine how they should proceed in the premises. After hearing testimony, the judge below referred the case back to the surveyors with instructions to search for and take as the boundary line a tree and fence mentioned in Judge Dugue's *deposition*, on file in the cause. From this decision the plaintiff appealed.

His counsel contends that if the view taken by the District Court be correct, the plaintiff is without remedy and may as well give up his case at once, for according to the decision, the whole matter is made to depend on the will of this witness; that he is to point out on the spot the line he pleases, which line, however erroneous it may be, the surveyors are nevertheless bound to take as the basis of their survey." An action of boundary lies not only when two contiguous estates have never been separated and the limits determined, but also when the bounds which have been properly fixed are no longer to be seen; La. Code, art. 819. It is not denied that these lands have been bounded for a great number of years back, but it is

EASTERN DIS.  
March, 1841.

ZERINGUE  
vs.  
HARANG'S  
ADMINISTRATOR

An action of boundary lies not only where two contiguous estates have never been separated, but also when the old boundary is effaced and can no longer be seen.

**EASTERN DIS.** said, on the part of the plaintiff, that these boundary posts are  
*March, 1841.*

**ZERINGUE**  
**VS.**  
**HARANG'S**  
**ADMINISTRATOR**

no longer visible, and that recourse must be had to the title papers in order to determine the boundary line, while the defendant contends that there are vestiges of the old bounds, rendering it useless to fix new limits; and that if any are to be fixed, they must be placed where the former line ran and not according to the titles. It is not difficult to perceive that the contest between these parties is for the 24 toises 5 feet which appear to have been many years ago measured out and allotted to Alexander Harang, in addition to the extent of land called for by his title. The controversy then turns upon a question of fact to wit: whether a boundary line has existed giving defendant that or any other quantity of land beyond what his title calls for; and whether it is possible to ascertain on the spot the place where the former line stood. Judge Dugue testifies that he does not recollect having seen the fence put up which always separated the two plantations, that it appeared to him a new fence when he remembers to have first seen it; he was then about seven or eight years old, and was born in the year 1789; that this fence has always been considered as placed on the boundary line between the two tracts; that there were ditches running along this fence on both sides and close to it was a tree which remained there long afterwards and the stump of which he saw not long since; that plaintiff's plantation formerly belonged to his (witness') father; and that he collects the place where the fence stood, its course, &c., and

Where vestiges of the ancient boundary between two plantations are to be seen, new posts should be fixed, but they must be placed where the former limit or fence stood, without regard merely to the title papers.

that a short time ago he saw a part of this fence yet standing on the premises. This testimony is not contradicted by any one as to the fact of a former limit having existed, and some traces being yet visible in the place spoken of by this witness. The surveyors only report that they saw no boundary posts; if none are any longer to be seen, new posts must be fixed, but they must be placed where the former limit or fence stood. If in placing them regard is had only to the title papers, defendant may be deprived of land to which he may have acquired

a title by prescription; for although one cannot prescribe against his own title, he can prescribe beyond his title; that is for more land than it calls for, if he has had an uninterrupted possession of the surplus during a sufficient length of time; La. Code, articles 848 and 849. But upon the whole, it appears to us that the instructions given to the surveyors are not conclusive on the rights of the parties. When their survey shall be returned into court, it will be competent for the plaintiff to contest defendant's right to this surplus of land not called for by his title; and he will recover it unless defendant shows such a possession of it under the former enclosures as will establish in him a right to the same by prescription; if therefore plaintiff has suffered any grievance, he can be relieved on the final judgment to be hereafter rendered in the cause, and should not have called upon us to interfere at this stage of the proceedings; La. Code, arts. 837, 843, 845, 847.

It is therefore ordered that this appeal be dismissed with costs.

EASTERN DIS.  
March, 1841.

THIBODEAUX  
vs.  
THOMASSON  
ET AL.

Although one cannot prescribe against his own title he can prescribe beyond it; and claim more land than his title calls for if he has had uninterrupted possession of the surplus a sufficient length of time.

No appeal lies from a decision of the court referring a case of boundary back to the surveyors appointed, with instructions to search for and run out a particular boundary line, referred to.

### THIBODEAUX vs. THOMASSON ET AL.

APPEAL FROM THE COURT OF THE SECOND DISTRICT FOR THE PARISH OF LAFOURCHE

INTERIOR, THE JUDGE OF THE FOURTH DISTRICT PRESIDING.

The peremptory exception, given by the 1988th article of the Code which says, "no creditor can sue individually to annul contracts made before his debt accrued," applies to all contracts, *in fraud of creditors*, when it appears the debtor never ceased to have possession of the objects apparently sold by him. The creditor who has contracted under the faith of his debtor's being the owner of property which he is in possession of at the time of the contract, ought to be allowed to seek his remedy without regard to the date of the pretended sale to a third person.

**EASTERN DIS.**  
*March, 1841.*

**THIBODEAUX**  
**vs.**  
**THOMASSON**  
**ET AL.**

When the thing sold remains in the corporeal possession of the seller, who is suffered to act as owner, to the injury of a third person, the rule that the delivery of immoveables always accompanies the public act which transfers the property, ceases to be applicable.

This is a revocatory action, to annul certain sales of property, alleged to be fraudulent and simulated.

The plaintiff alleges that the defendants, Alexander Thomasson and C. Coulon are indebted to him in the sum of \$3,553,25, with interest; and for the further sum of \$2,306, 50, the amount of three promissory notes executed by them the 15th and 16th December, 1836, 1838, and 14th July 1838, payable 8 months, 4 months, and 60 days after date, which were protested at maturity for non-payment. He further shows that the defendant, Alexander Thomasson is in the possession of a half lot of ground in the town of Thibodeauxville, which on the 19th March, 1830, he pretends to have sold to his two sisters, Marie A. and Eugenie Thomasson, for \$2,500, and that Eugenie pretends to sell her undivided half to her sister, in 1831, for \$1,200; and that the latter pretends to have sold the whole of said lot to St. Clair Thomasson for the sum of \$4000.

He further shows that in June, 1831, one Wm. A. Schaeffer sold a slave named Milly to Marie A. Thomasson, but that she has ever since remained in the possession of the defendant A. Thomasson, which sale is also alleged to be simulated.

The plaintiff alleges that these sales are all fraudulent and simulated; the original owner Alexander Thomasson being allowed to remain in possession all the time; that he is now in possession and has no other property. Wherefore he prays judgment against said defendants, Thomasson and Coulon; and that the pretended vendees of the slave and lot of ground in question be all cited and made parties; that said sales be declared fraudulent and simulated, cancelled and annulled, and that the property be sold to satisfy his demand.

St. Clair Thomasson, one of the defendants, pleaded a pe-

remptory exception to the plaintiff's action ; averring that by his own showing he cannot maintain this suit against the defendants, to set aside the sales ; because the different contracts sought to be avoided and annulled are of a date long anterior to the *accruing* of the *debts* sued on against his co-defendants. These exceptions were sustained by the court, and the suit dismissed, as to all the defendants but A. Thomasson and C. Coulon. The plaintiff's counsel took a bill of exceptions to the decision of the court.

EASTERN Dis.  
March, 1841.

THIBODEAUX  
vs.  
THOMASSON  
ET AL.

The other defendants pleaded a general denial. There was judgment against them for the amount of the plaintiff's demand.

The plaintiff appealed.

*Miles Taylor*, for the plaintiff, contended :

1st : In cases of contracts which purport to transfer immoveable property, if he who transfers it is suffered by the transferer to remain in corporeal possession for a longer time than is reasonably required to deliver the actual possession, and to act as owner to the injury of a third person who may afterwards contract with him, or acquire rights upon his property as creditors, the property pretended to be transferred will be subject to the payment of the subsequent creditors, *unless the pretended transfer proves* that the contract was made in good faith. La. Code, 1915.

2d. The principle that the sale is perfect as soon as there exists an agreement for the object and for the price thereof, although the object has not been delivered or the price paid, relates only to the parties to the act. *Idem* 2431.

3d. The delivery is the transferring of the thing sold into the power and possession of the buyer, and until it is delivered it is subject to the rights of the creditors of the seller.—*Idem* 2452. Pothier, *contrat de vente*, 319, 320, 321. 5 Martin N. S. 147. 7 *Idem* 579.

4th. The manner in which the delivery of the thing sold is



EASTERN Dis. effected varies, according to its nature, and the manner of the March, 1841. transfer. Idem 1918, 2453, 2454, 2455, 1914, 1916, 1917.

TRIBODEAUX  
VS.  
THOMASSON  
ET AL.

5th. The rule that the delivery of immoveables always accompanies the public act which transfers the property, does not apply when the thing sold remains in the corporal possession of the seller. When that is the case the sale is presumed to be simulated, and with respect to third persons, the parties must establish the validity of it. Idem 2456, 1915.

6th. The article 1988, on which the defendants formed their defence, does not affect a case like the one before the court. The actions had in view by that article, are those instituted to avoid contracts *carried into effect*, and so far clothed with the formalities of law, and the *signs of good faith*, that they are *presumed* to be valid, and the burthen of proving the fraud and consequent nullity is thrown on the person attacking them. The case now in question is different. The law *presumes the contracts attacked to be simulated and fraudulent*, and the burthen of proving good faith and establishing the reality of the contracts is thrown on the persons defending them. *Or, in other words the law considers the contracts as not made and of none effect, until the contrary is shown.* Idem 2456, 1915.

7th. There are other actions for annulling contracts given by our law besides that given by the 7th section of the chapter on conventional obligations in the Civil Code, and they involve the same principles with the one now before the court. Idem 3332. 2 Moreau's Dig. 431, sec. 24.

*Isley & Nicholls*, for the defendants and appellees, insisted that the judgment was correct and should be confirmed.

*Simon, J.* delivered the opinion of the court.

Plaintiff represents that the defendants, Coulon and A. Thomasson, are indebted to him in several sums of money amounting together to \$5859 75, with interest, on certain notes

dated 16th December, 1836, 14th July and 15th December, 1838. That by a notarial act passed on the 19th of March, 1830, Alexander Thomasson, who was possessed as owner of a certain half lot of ground situated in the town of Thibodeauxville, measuring 70 feet front by 140 deep, &c., pretended to sell the said lot to Mary A. Thomasson and Eugénie Thomasson, his sisters, for the price of \$2500; that by another public act passed before the same notary on the 5th July, 1831, Eugénie Thomasson, pretended to sell the undivided half of the said half lot to Mary A. Thomasson, who, afterwards, by another public act passed in New Orleans on the 27th of February, 1834, sold the whole of the same to St. Clair Thomasson, for the price of \$4000. He further states that by private act dated the 22d of June, 1831, recorded on the 6th of July, one Wm. A. Schaeffer sold a mulatto woman named Milly to Mary A. Thomasson, which said slave though apparently sold to the said Mary, was in truth sold to Alexander Thomasson; and that she was falsely named as the purchaser thereof with the intent to shelter the slave from the pursuit of Alexander's creditors. He also alleges that the said Mary, Eugénie and St. Clair Thomasson have suffered the said Alexander to remain in the corporeal possession of the said lot and slave; that he has always continued to act as the owner of the same; that he did so at the time when the obligations sued on were contracted by him; that he has continued to do so to the time of the institution of this suit, and that the said pretended vendees have never exercised any right of any kind to the said property. He attacks all the said acts as false, fraudulent and simulated, adds that Alexander Thomasson has no other property to satisfy the debt for which he is sued; and concludes by praying for judgment against the two debtors for the amount claimed, and further, prays that Mary A. Thomasson and her husband, and St. Clair Thomasson be made parties to this suit, and that the acts of sale above recited be adjudged to be false and simulated and made in fraud of creditors; that the same be avoided as to

EASTERN DIS.  
March, 1841.

THIBODEAUX  
VS.  
THOMASSON  
ET AL.

EASTERN DIS.  
March, 1841.

TRIBODEAUX  
vs.  
THOMASSON  
ET AL.

their effects on him, the plaintiff, and that the lot of ground, slave Milly and her issue, be applied to the payment of the amount of the debt sued for in principal, interest and costs. Alexander Thomasson answered and pleaded the general issue; Coulon confessed judgment, and judgment was first regularly rendered against them in favor of the plaintiff for the whole amount of his claim.

The other defendants, St. Clair Thomasson and Mary A. Thomasson, appeared and filed a peremptory exception to the plaintiff's action, averring; that according to his own showing, plaintiff cannot maintain his action, because the different contracts of sale referred to in his petition and sought to be avoided and annulled, are, according to the allegations therein contained, of a date *long anterior* to the accruing of the debt declared on against their co-defendant, Alexander Thomasson. The District Court sustained the exception and dismissed the suit; from which judgment plaintiff appealed.

The peremptory exception on which the judge *a quo* dismissed this action, appears to be predicated on the art. 1988 of the *La. Code*, which says: *no creditor can by the action given by this section (revocatory action) sue individually to annul any contract made before the time his debt accrued,*" and it

The peremptory exception, given by the 1988th article of the Code, which says, "no creditor can sue individually to annul contracts made before his debt accrued," applies to all contracts, in fraud of creditors, when it appears the debtor never ceased to have possession of the objects apparently sold by him.

has been strenuously contended before us, that no exception can be made to this general rule, as the law which is worded in general terms, does not make any. We understand the action given by the section of the Code to which the article 1988 refers, to be that allowed to creditors for the purpose of avoiding contracts *apparently complete* and regularly carried into effect by their debtors, and so far clothed with the formalities of the law and semblance of good faith and truth that they must necessarily be presumed to be valid and lawfully made. In such cases, the burthen of proof is thrown upon the creditors who attack those contracts as made in fraud of their rights under the different rules and restrictions contained in the section of the Code above alluded so. But when, as in the present

case, the allegations on which the action is based, show that the debtor has never ceased to be in possession of the objects by him apparently sold, that no real delivery has ever been made to his vendees, we think that the rule established by the article 1988, does not apply, and that the creditor who has contracted under the faith of his debtor's being the owner of the property which he is in possession of at the time of the contract, ought to be allowed to seek his remedy under some other provisions of the law.

*Between the parties* to an act of sale, the contract is perfect as soon as there exists an agreement for the object sold and for the price thereof, although the object has not yet been delivered nor the payment made; *La. Code, art. 2431*; but in all cases where the thing sold remains in the possession of the seller, there is reason to presume that the sale is simulated, and with respect to third persons, the parties must produce proof that they are acting in good faith and establish the reality of the sale; *La. Code, art. 2456*; this rule is still more explicitly established in *art. 1915*, in these words: "*In cases however of contracts, which purport to transfer immoveable property, if he who transfers it is suffered by the obligee to remain in corporeal possession for a longer time than is reasonably required to deliver the actual possession and to act as owner, to the injury of a third person, who may AFTERWARDS contract with him, or may acquire rights upon his property as creditor, it will be considered as a MARK OF FRAUD, and will throw the burthen of proving that the contract was made BONA FIDE upon him to whom the property was transferred by the first contract, in any controversy with creditors of the obligor or persons acquiring BONA FIDE intermediate rights by contract with him.*" Here then, the law has specially provided for a case like the present; it has foreseen that there may be cases in which an individual might contract with another, or acquire rights upon his property as creditor, although he may have previously transferred his immoveable property to another per-

EASTERN DIS.  
March, 1841.

THIBODEAUX  
VS.  
THOMASSON  
ET AL.

The creditor who has contracted under the faith of his debtor's being the owner of property which he is in possession of, at the time of the contract, ought to be allowed to seek his remedy without regard to the date of the pretended sale to a third person.

EASTERN DIS  
March, 1841.

THIBODEAUX  
vs.  
THOMASSON  
ET AL.

When the thing sold remains in the corporeal possession of the seller, who is suffered to act as owner to the injury of a third person, the rule that the delivery of immoveables always accompanies the public act which transfers the property, ceases to be applicable.

son, and that by being suffered to continue to remain in the corporeal possession of it, this possession may cause an injury to a third person, as it may be used perhaps as an inducement upon others to deal with one who possesses and is apparently the owner of valuable property. Were we to adhere strictly and exclusively to the letter of the article 1988, and thereby to sanction the doctrine urged upon us by the defendants' counsel, which doctrine would be mischievous in its effect and consequences, our laws would not only become vain and nugatory, but would be used a shield under the protection of which the grossest and most flagrant frauds would be committed! How easy would it be for a contriving and fraudulent debtor to make a written and simulated contract of sale in collusion with another at a time when no suspicion can exist, so as to enable him afterwards, by remaining in the possession and apparently the owner of the property, to defraud subsequent *bona fide* creditors, who relying on the principle of law that the property of a debtor are liable for all the consequences attending the non-performance of his obligations, would be without remedy, as any attempt on their part to avoid such fraudulent transfers, would be successfully opposed by the plea that the act of sale is of a date anterior to the accruing of the debts! This our law has never had in contemplation; the remedy must be allowed where the right exists; and in resuming we do not hesitate to say: that when the thing sold remains in the corporeal possession of the seller, who is suffered to act as owner to the injury of a third person, the rule that the delivery of immoveables always accompanies the public act which transfers the property ceases to be applicable; that in such case, the sale is presumed to be simulated and fraudulent; that creditors may attack it as such, without any limitation, as long as the corporeal possession continues, although the written evidence of the transfer may have been passed before the time the debt accrued; and that in an action brought to annul such fraudulent contracts, the burthen of proving that it was made *bona fide*

being thrown upon him to whom the property was transferred, it is his duty to establish its reality.

**EASTERN Dis.  
March, 1841.**

With this view of the question, we think that the District Judge erred in sustaining the exception, and the case must be remanded for further proceedings.

**LESSEPS  
vs.  
PONTCHARTRAIN  
RAIL ROAD CO.**

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; that the peremptory exception filed by the defendants and appellees be overruled, and that this case be remanded to the lower court for further proceedings according to law; said appellees paying costs in this court.

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**LESSEPS vs. PONTCHARTRAIN RAIL ROAD COMPANY.**

**APPEAL FROM THE COURT OF THE FIRST DISTRICT.**

Where the evidence shows that a slave, mules and cart were run over and destroyed through the fault and folly of the slave in driving across the rail road of the defendants, when the engine was approaching and near, the owner cannot recover any thing for their loss.

This is an action to recover from the Pontchartrain Rail Road Company, the value of a slave, two mules and a cart, with damages, which the plaintiff alleges were killed and destroyed by the engine of the rail road through the negligence and fault of the Rail Road Company's agents and engineer.

The defendants denied all the allegations in the petition and prayed that the suit be dismissed.

The evidence showed that as the engine with a large train of cars had approached within about one hundred and fifty feet of the depot of the rail road, the plaintiff's negro man, who



**EASTERN DIS.** was driving two mules in a cart, attempted to drive across the  
March, 1841. road before the engine when it was coming up at nearly full

**LESSEES**  
**vs.**  
**PONTCHARTRAIN** negro and mules on to the side of the road, they were crush-  
**RAIL ROAD CO.** ed, and the negro so badly wounded that he soon afterwards  
died. The witnesses stated that the negro was told not to drive  
across until the engine passed, but gave no heed, cracked his  
whip, and in the affright the mules halted on the road and  
all were struck down.

By an agreement the case was submitted to the jury and a majority allowed to decide on the verdict. "Seven persons out of twelve found a verdict for the plaintiff in the sum of one thousand dollars." From judgment confirming this verdict the defendants appealed.

*Lockett*, for the plaintiff, contended that from the testimony of the leading witnesses the engine and cars were running at such speed when the accident happened, that must render the defendants liable; they are bound to pay all the damages occasioned by their misconduct in running at full speed through a crowded street. It was highly imprudent and dangerous, and shows that the proper care was not used by the officers to prevent accidents. The testimony conclusively shows that the engine was running at *unusual speed* that day on entering the depot, and that the negro was run over by the negligent misconduct of the defendants' agents. They are therefore responsible for the loss and damage occasioned by such negligence.

*Eustis & Hoa*, for the defendants, insisted that the accident occurred by the gross negligence and imprudence of the slave driving the cart. The company's agents made every effort in their power to avoid the accident. It was wholly attributable to the imprudence and misconduct of the slave; and the damage was occasioned from the want of care and skill of the driver, or the unmanageableness of the mules, and for neither are the defendants' responsible.

2. It has been well said by the learned author of the treatise *EASTERN DIS.* on shipping (then Mr. Abbott, since *Lord Tenterden*.) in an *March, 1841.* action for damages occasioned by the collision of two vessels and running one of them down, "If there was want of care *LESSEES* on both sides the plaintiffs cannot maintain their action; to enable them to recover the action must be attributable entirely to the fault of the crew of the defendant's vessel." *vs.* Vanderplank et al. *vs. Miller et al.*, 22 English Common Law Reports, 280. *PONTCHARTRAIN RAIL ROAD CO.*

*Garland, J.* delivered the opinion of the court.

This suit is brought to recover the value of a slave, two mules, a cart, and damages for the loss of them. The plaintiff says, that by the negligence and mismanagement of the engineer or conductor of one of the steam cars, in use in the year 1834, on the rail-way belonging to the defendant, it was run against the cart of the plaintiff, which was broken to pieces, the mules killed and the slave so badly wounded, that he died soon after. The defendants plead a general denial. The case was tried by a jury, and by agreement a verdict was rendered by a majority of the jurors as follows: "Seven persons out of twelve find a verdict in favor of plaintiff in the sum of one thousand dollars." A new trial was asked for and refused and an appeal taken.

We generally give much weight to the verdict of juries on matters of fact, but to a verdict rendered under the circumstances in this case, very little regard is to be attached.

Mr. Percy, a witness for the plaintiff, says he was present when the accident occurred. The cart was crossing the rail road and was driving unusually fast. There was a great noise on the road at the time and the car was going fast, the slave made every exertion to get clear. He was under the impression the car might have been stopped. The mules were on the middle track when the steam car was about one hundred and fifty feet off. The car was coming from the lake, about three or four o'clock in the afternoon. He heard persons telling the

**EASTERN DIS.** boy to get away, but he was frightened. Thinks a small train  
**March, 1841.** of cars could have been stopped—there was an ascent at that  
**LESSEPS** part of the road and a large train behind. The car that day  
**VS.** was going unusually fast.  
**PONTCHARTRAIN**  
**RAIL ROAD CO.**

Pierre Latran, another witness for the plaintiff, gives a nearly similar account as to the manner the accident occurred, but says that he is positive the car was not going with greater velocity than on other days, though it was going with great force. The mules were out of the track, were frightened and backed, when the car struck the cart and knocked it under the shed. Says the engineer made no effort to stop the car.

J. W. Stilwell, a witness for the defendant, was present when the cart was run over. When he first saw the engine it was about one hundred feet off, coming up the rail road, the slave and cart about equi-distant from the point they came in contact. A number of persons were present, and there was a universal shout to the boy to stop. He could have stopped, but kept on. As soon as the cry was given, the engineer stopped the safety-valve and put his whole weight on the stop or brake of the car. The car was going very rapidly, but it is the opinion of witness the accident did not occur by the fault of the engineer, but by the fault of the negro. He was one hundred feet off when he was told to stop. The witness thought at the time the slave was drunk, and has always been of that opinion.

M. W. Hoffman, Esq., was also present at the time. His testimony coincides very nearly with that of Stilwell. The negro was told to stop and not to cross the road before the engine. One of the officers of the Rail Road Company told him to stop; he flourished his whip and made a dash to get across, but the negro and mules appeared to be arrested by fright and the engine came against the hind part of the cart and threw it with the driver and mules alongside the track. Thinks the boy could have stopped the mules in time to have prevented the accident, or have turned them aside. He must have seen

the engine approaching. Thinks there was no imprudence on the part of the engineer. The car was not coming faster than usual, at the rate of about fifteen miles per hour.

Upon the evidence before us, we cannot agree with the majority of the jury in the conclusion to which they have come.

Although we consider it indiscreet in the defendants to run their cars in a crowded street, at the rate the one in question was going, still as it was not unusual, according to the testimony of three of the four witnesses, and as great presumption and folly are proved on the slave of the plaintiff, we cannot agree to affirm the judgment. The charge of negligence and mismanagement against the engineer or conductor is not proved, without which the plaintiff cannot expect to recover, in a case where it is proved to have been on the side of his servant.

The judgment of the District Court is therefore annulled, avoided and reversed and judgment given in favor of the defendants, with costs in both courts.

EASTERN DIS.  
March, 1841.

MACARTY  
VS.  
COMMERCIAL  
INSURANCE CO.

Where the evidence shows that a slave, mules and cart were run over and destroyed through the fault and folly of the slave, in driving across the railroad of the defendant when the engine was approaching and near, the owner cannot recover any thing for their loss.

### MACARTY vs. COMMERCIAL INSURANCE COMPANY.

#### APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A donation of slaves without estimation, under the old Civil Code, is null, although accompanied by delivery, as delivery only applies to *moveables*; but under the La. Code a donation of a house and lot is valid *without estimation* or appraisement, which only is required in cases of *moveable* effects.

The bare possibility that a right to property might hereafter arise, cannot be considered as an insurable interest.

To have an insurable interest in any subject or property, a person must be liable to a direct and immediate loss by its damage or destruction.

EASTERN DIS.  
March, 1841.

MACARTY  
VS.  
COMMERCIAL  
INSURANCE CO.

So where a party has parted with all his insurable interest in property before its destruction, *he cannot recover.*

Parol evidence or testimonial proof will not be received to show that in case of a *donation* of a house and lot, by authentic act, it was agreed the *donor* should continue to receive and enjoy during his lifetime, *the rents* of the property.

A policy of insurance against fire is a *personal* contract of indemnity with the insured; and if the latter parts with all his interest in the property before the loss happens, the policy becomes void, unless it has been assigned to the new proprietor with the assent of the underwriters.

This is an action on a Policy of Insurance, to recover the sum of \$2,300, the value at which a house and appurtenant buildings were insured at, in Champs Elysees street in New Orleans, and destroyed by fire.

The plaintiff alleges that on the 19th May, 1836, he caused insurance to be made at the office of the defendants, on the foregoing property, to the amount or value stated, and that during the continuance of the policy of insurance, to wit: on the 8th April, 1837, the buildings insured were destroyed by fire, and that the insurers thereby became liable for the entire amount of the insurance. He prays judgment therefor.

The defendants denied that the plaintiff was the owner of the property insured or that he had any insurable interest therein, at the time it was destroyed, and prayed that the suit be dismissed.

Upon these pleadings and issues the cause was tried.

The evidence showed that on the 26th September, 1836, after taking out the policy of insurance on the buildings in question, the plaintiff made a donation *inter vivos*, by authentic act of this property to Mademoiselle Eugenie Adelaide Gomez, without assigning, or in any manner conveying the policy of insurance. The act of donation gives the houses and lot which were insured, together with other property, to the said donee *in full* property, without any restriction or qualification whatever, except that she cannot alienate it; and can only dispose of it by last will and testament. Evidence or the deposition of the donee, was offered by the plaintiff and

rejected, to show that it was agreed between her and the plaintiff that he was to receive and enjoy the rents and profits of the premises, and that he did receive them, pay the taxes, make all repairs, &c.; thereby indicating that he had a qualified interest or right of property in the same, which amounted to an insurable interest.

EASTERN DIS.  
March, 1841.

MACARTY  
VS.  
COMMERCIAL  
INSURANCE CO.

The case turned on the question, had the plaintiff an insurable interest in the property at the time of its destruction by fire? The District Judge decided this question in the negative; and from judgment for the defendants the plaintiff appealed.

*Grymes*, for the plaintiff.

*Preston*, contra.

*Morphy J.* delivered the opinion of the court.

The plaintiff seeks to recover \$2,300 on a policy of insurance, in the usual form against loss and damage by fire. On the 19th of May, 1836, he caused insurance to be effected on a house and kitchen for the space of one year; within that time, the buildings were totally destroyed by fire, but before this loss occurred, the insured had made a donation *inter vivos* of the property to one Eugenie Adelaide Gomez, and had transferred to her all his title and interest in and to the same in the most unqualified terms; the only restriction imposed on the donee's absolute right of ownership was that she could not alienate or dispose of the property, except by last will and testament. The question is whether at the time of the loss there remained in the donor such an interest in the property insured as should entitle him to recover.

It is said that this donation is void for want of the appraisal required by article 1525 of the Louisiana Code; and we have been referred to the case of *Williams et al. vs. Horton's* curator, in 4 Martin, N. S., 464. Admitting that a party can be permitted to impugn his own deed in order to recover



**EASTERN DIS.**  
**March, 1841.**

**MACARTY**  
**vs.**  
**COMMERCIAL**  
**INSURANCE CO.**

A donation of slaves without estimation, under the old Civil Code, is null, although accompanied by delivery, as delivery only applies to *moveables*; but under the La. Code a donation of a house and lot is valid *without estimation* or appraisement, which only is required in cases of *moveable effects*.

rights which he might have lost by executing the same, the ground assumed is untenable. The decision alluded to relates to a donation of slaves made under the old Civil Code which required in express terms that slaves and moveables comprised in a donation *inter vivos* should be estimated; C. Code, page 128, art. 48. The Louisiana Code provides for this appraisement only with respect to moveable effects.

It is next contended that as this donation is liable to be revoked or dissolved on account of ingratitude on the part of the donee or the birth of children to the donor, there was a contingent right or interest in the property subsisting in plaintiff at the time of the loss. If this be true, it is difficult to imagine a case in which a vendor of insured property destroyed by fire could not with as much reason set up a similar claim; he might always be said to have a contingent interest in the property sold, because a sale is liable to be cancelled for lesion, fraud, error, non-payment of the price, &c. And so may every contract be annulled for some cause known to the law, if such cause of nullity should be shown to exist. A vendor's interest would not be more remote or unsubstantial than that now supposed to have existed in plaintiff; La. Code, art: 1546, 1547, 1548, 1556. The bare possibility that a right to property might hereafter arise cannot be considered as an insurable interest; there must surely be something at risk in which the insured is actually interested and for which in case of loss he can claim indemnity. The general rule is that in order to have an insurable interest in any subject, a person must be liable to a direct and immediate loss by its damage or destruction. 1 Philips on Ins. p. 68, ed. of 1840. The loss of the property in this case fell on the donee who had become the absolute owner of it by a title translatif of property; and had the policy been assigned to her with the consent of the underwriters, she was clearly entitled to recover. It could not have been objected to her that her title was defeasible by the happening of those contingencies upon which plaintiff at-

The bare possibility that a right to property might hereafter arise, cannot be considered as an insurable interest.

To have an insurable interest in any subject or property, a person must be liable to a direct and immediate loss by its damage or destruction.

tempts to show an interest in himself. Had any of the causes occurred which in law would give rise to plaintiff's right of revocation or to a legal reversion of the property to him, his interest in the same might perhaps be said to have revived, but when none of these causes existed at the time of the loss, when it is not even made probable that they ever will exist, how can the plaintiff be supposed to have suffered a loss for which he must be indemnified? having parted with all his interest in the property before its destruction, plaintiff cannot recover. 8 Massachusetts Rep. 515.

*EASTERN DIS.  
March, 1841.*

*MACARTY  
vs.  
COMMERCIAL  
INSURANCE CO.*

So where a party has parted with all his insurable interest in property before its destruction, he cannot recover.

In order to establish an actual and subsisting interest in himself at the time of the loss, the plaintiff has offered testimony to prove that previous to and at the time of this donation, there was an understanding and agreement between the donee and him that notwithstanding the donation he was to continue to receive and enjoy the rents of the house during his lifetime, and that pursuant to such agreement he did receive the rents and pay all repairs, taxes, &c. up to the time of the fire. The introduction of this testimony was resisted as inadmissible under the article 2256 of the Louisiana Code; it appears to us that it should not have been received; it goes to show between the parties a donation *causâ mortis* instead of one *inter vivos* as evidenced by the deed. But even were this agreement legally proved, we do not think it could avail the plaintiff under the evidence in the record before us.

Parol evidence or testimonial proof will not be received to show that in case of a donation of a house and lot, by authentic act, it was agreed the donor should continue to receive and enjoy during his lifetime, the rents of the property.

A policy of insurance against fire is a personal contract of indemnity with the insured; if the latter parts with all his interest in the property before the loss happens, the policy becomes void unless it has been assigned to the new proprietor with the consent of the underwriters. If the assured retains but a partial interest in the property, it will only protect such insurable interest as he had at the time of the loss: such is the doctrine of the leading cases on this subject. 3 Brown's Parliament cases, 497. 2 Atkins 554. 16 Wendell 397. 1 Hall 44. What then is the loss sustained by plaintiff? It

A policy of insurance against fire is a personal contract of indemnity with the insured; and if the latter parts with all his interest in the property before the loss happens the policy becomes void, unless it has been assigned to the new proprietor with the assent of the underwriters.

**EASTERN DIS**  
*March, 1841.*

**MACARTY**  
**VS.**  
**COMMERCIAL**  
**INSURANCE CO.**

cannot be the full value of the house insured; for before the loss, he had divested himself of all proprietary right in it, legal or equitable. This right to receive the rents which it is said the donee had agreed to let plaintiff enjoy was an interest of a character and value quite different from that which he had at the time of the insurance. Had it been described to the underwriters, and made the subject matter of the insurance, a value might have been put upon it, which of necessity would have been considered as liquidated damages recoverable by the insured, but insurance here was effected for \$2,300, as the full value of the house; since then it had ceased to belong to the plaintiff; admitting the latter's interest under this agreement in relation to the rents, the record contains no evidence which can enable us to measure the damages or loss resulting to him from the destruction of the property. It has been pressed upon us that the least vestige of interest subsisting at the time of the loss authorizes a full recovery. To this proposition we cannot accede. It is repugnant to the principle of indemnity which pervades the whole law of insurance against fire; nor do we think it sustained by the adjudged cases to which we have been referred. That any insurable interest legal or equitable, remaining in the insured at the time of the fire, will be protected by the policy, there cannot be a doubt, but a recovery can be had only for the value of that interest; or to the extent of the actual loss proved on the trial; the sum mentioned in the policy is to be regarded as the extent of the insurer's liability, and not as the measure of the assured's claim. The undertaking is to pay the amount of the actual loss or damages sustained by the insured; provided, it does not exceed the sum mentioned in the policy, to which the indemnity is limited; 1 Hall 46. Hammond on Insurance 2 and 19.

It is therefore ordered that the judgment of the District Court be affirmed with costs.

## WHITE vs. MORENO.

EASTERN DIS.  
March, 1841.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF EAST

BATON ROUGE, THE JUDGE THEREOF PRESIDING.

WHITE  
vs.  
MORENO.

Pleas in compensation or reconvention should be set forth with the same certainty as to amounts, dates, &c., as if the party opposing them were himself a plaintiff in a direct action. Compensation must be specially pleaded.

This is an action to recover the sum of \$1400, the value of the plaintiff's services as an assistant clerk to the defendant for upwards of two years, according to an account annexed.

The defendant pleaded a general denial and required strict proof; but admitted the plaintiff was in his employment as assistant clerk about eighteen months; and that from his dissipation and incompetency to discharge the duties of his station, his services were not worth more than \$20 per month; which has been fully paid and compensated. He further avers that the plaintiff is indebted to him in the sum of \$600, for cash advanced and bills paid for him to several persons mentioned, for which he prays judgment in reconvention, after dismissing the plaintiff's demand.

Upon these pleadings and issues the parties went to trial before the court and a jury. The plaintiff produced the testimony of various witnesses to establish the value of his services and the amount of his demand.

The defendant offered the individuals to whom he averred he had paid bills in compensation of the plaintiff's account to the amount of \$600, to which testimony the plaintiff objected on the ground that there was no averment in the defendant's answer of the specific amounts and dates of said payments made to each of said witnesses; and the objection was sustained by the court, to which decision the defendant's counsel excepted.

There was a verdict and judgment in favor of the plaintiff for \$577, and after an unavailing effort to obtain a new trial, the defendant appealed.

**EASTERN DIS.** *Morgan*, for the plaintiff, urged the affirmance of the judgment. The evidence offered was properly rejected, because  
**March, 1841.**

**WHITE  
VS.  
MORENO.**

ment. The evidence offered was properly rejected, because the plea of compensation was not set forth in such a manner as to authorize the reception of the evidence. Pleas in compensation should be set forth with the same certainty as to amounts, dates, &c., as if the party was himself plaintiff; C. Pr., art. 367,

*Eustis*, for the appellant, insisted that the bill of exceptions was well taken. The averments in the answer, coupled with the relations of the parties as disclosed in the petition are sufficient to authorize the admission of the evidence. The names of the persons to whom the sums were paid were given in the answer, and their testimony would have made them specific as to amounts and dates.

2. The weight of evidence is such as to authorize this court for the purposes of justice to award a new trial.

*Morphy J.* delivered the opinion of the court.

The plaintiff claims \$1400 for his salary during two years and four months as assistant clerk of defendant in the District, Parish and Probate Courts in and for the parish of East Baton Rouge. The answer admits the services of plaintiff, but charges him with neglect and unskilfulness in the discharge of his duties; and with habits of dissipation, in consequence of all which his services are alleged to have been at no time worth more than \$20 per month. The defendant further avers that plaintiff is indebted unto him in the sum of \$600 for cash advanced and bills paid for account of plaintiff to divers persons, which sum he offers as an offset against the plaintiff's claim. The case was submitted to a jury, who gave plaintiff a verdict for \$577. After an effort to set it aside, the defendant appealed.

Our attention has been drawn to a bill of exceptions to the opinion of the Judge below, who refused to hear witnesses to prove the payment of the \$600 alleged to have been paid to

plaintiff. The reason assigned by the judge was that there were no allegations in the defendant's answer of the specific amounts paid to each of the witnesses, and the dates of the said payments made by the defendant. We think that he decided correctly. Article 367 of the Code of Practice requires compensation to be pleaded specially. Pleas in compensation or in reconvention should be set forth with the same certainty as to amounts, dates, &c., as if the party opposing them were himself a plaintiff in a direct action. The reasons for so doing are the same in both cases. It was perhaps the more necessary to do it in the present instance, as the testimony was offered to contradict plaintiff's answer to an interrogatory propounded by defendant, in relation to this amount or sum of \$600, alleged to have been paid to him. The answer was that the plaintiff had received only \$394 62, of which there was about \$200 paid by defendant in cash.

EASTERN Dis.  
March, 1841.

WHITE  
vs.  
MORENO.

Pleas in compensation or reconvention should be set forth with the same certainty as to amount, dates, &c., as if the party opposing them were himself a plaintiff in a direct action. Compensation must be specially pleaded.

As to the merits of this case as exhibited by the record, there appears to have been some difference of opinion as to the value of plaintiff's services. It has also been proved that some time was lost in consequence of the plaintiff's occasional dissipation; for this, however, the jury appear to have made some allowance. Upon the whole, we are not prepared to say there is manifest error in the verdict; or that the purposes of justice require that the case should be remanded for a new trial.

The judgment of the District Court is therefore affirmed with costs.



EASTERN DIS.  
March, 1841.

HARRELL vs. HARRELL ET AL.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF EAST FELICIANA.

HARRELL  
vs.  
HARRELL ET AL.

The action given to the surviving wife, to claim her marital portion, when she is in necessitous circumstances, presupposes a liquidation and final settlement of the succession of the husband; and also of the community lately existing between them.

It is only after the liquidation and settlement of the succession that the action for the marital portion is open, which depends on two essential and relative facts; that the husband *died rich*, and left his widow in *necessitous circumstances*.

This is an action by the surviving wife of Thomas Harrell, deceased, to recover the marital portion of her deceased husband's estate.

The petitioner alleges that her husband died rich but left her in necessitous circumstances, not having brought into marriage any dowry or inherited or received any property during marriage. That her husband's estate amounts, according to the inventory to about \$20,000; and that he left no decendants. She further shows that the defendants, who are the mother, brothers and sisters of the deceased, have taken possession of her husband's estate and refuse to allow her the legal portion to which she is entitled; to wit: one fourth of the estate in full property. She prays judgment accordingly for this amount.

The defendants excepted to the petition, averring that they had not been recognized as heirs of the deceased; or been put in possession of his estate, &c. These exceptions being overruled, in answer to the merits the defendants pleaded a general denial of all the allegations in the petition.

On these pleadings and issues the cause was tried.

The evidence showed that the estate inventoried upwards of \$20,000, but that it had never been fully administered, or its affairs settled and liquidated, so as to show the actual amount after paying all the debts, &c.

The Judge of Probates gave judgment for the plaintiff for

one fourth of the value of the estate of the deceased, without specifying any amount or sum. The defendants appealed.

EASTERN Dis:  
March, 1841.

Lawson, for the plaintiff.

HARRELL  
CO.  
HARRELL ET AL.

Andrews, for the appellants.

Simon J. delivered the opinion of the court.

Plaintiff, who is the widow of one Thomas Harrell, alleges that she is in necessitous circumstances, and was so at the time of the death of her husband, whose estate, according to the inventory, amounts to about twenty thousand dollars; that under the art. 2359 of the Louisiana Code, she is entitled to take out of his succession, the one fourth thereof in full property, as he left no descendants. She prays that her husband's mother, brothers and sisters be cited, and that she may be allowed her marital portion to the amount of one fourth of her deceased husband's estate.

Defendants excepted to plaintiff's petition and declined answering thereto, on the grounds: that they never had been recognized as the legal heirs of the deceased; that an administrator of the succession was appointed without their consent and approbation; that they never were cited to declare whether they would accept or repudiate said succession; that they have no capacity to stand in judgment in relation to the same; and that they are not in possession of the succession as heirs, &c. &c. These exceptions having been overruled, the defendants answered to the merits and pleaded the general issue; and the cause having been tried on its merits, the Probate Judge rendered judgment in favor of the plaintiff, allowing her to *recover of the defendants one fourth part of the estate of her deceased husband in full property*. From this judgment, defendants appealed.

The inventory of the property left by the deceased, shows that his estate is worth \$13020 90; a part of which, to wit: from about thirteen to eighteen hundred dollars, is proven by

**EASTERN DIS.** parol evidence to be community property, one half of which  
**March, 1841.** has never been applied for by plaintiff. The inventory does

**HARRELL** not show the amount of the debts which may be owing by the  
**VS.** succession; it does not appear that any settlement of the said  
**HARRELL ET AL.** succession and community, was ever made; so as to liquidate  
 and ascertain the exact amount of the estate of the deceased;  
 and the record shows that the principal matter in controversy  
 between the parties in the court below, was altogether on the  
 sufficiency of the means or resources of the plaintiff, as pro-  
 ceeding from the said community and from the estate of her  
 father.

The action given to the surviving wife to claim her marital portion, when she is in necessitous circumstances, presupposes a liquidation and final settlement of the succession of the husband; and also of the community lately existing between them.

It is perfectly clear that the action given to the wife by the art. 2359 of the Louisiana Code, to claim her marital portion, when she is in necessitous circumstances, presupposes a liquidation and final settlement of the affairs and debts of the succession, as also of the community which may have existed between her and the deceased; it is only after such liquidation has been made, so as to ascertain the real situation of the estate, that her right of action is open, and that the court to whom the application is made by the surviving spouse, becomes enabled to determine on the existence of the two essential and relative facts required by law: that *the husband died rich*, and that he left *his wife in necessitous circumstances*; 6 La. Rep. 110.

It is only after the liquidation and settlement of the succession that the action, for the marital portion is open, which depends on two essential and relative facts; that the husband died rich, and left his widow in necessitous circumstances.

In this case, the inventory of the succession, showing only the active part of the estate, was taken by plaintiff as the basis of her action; and the Judge of Probates appears to have predicated his opinion on the supposition that the amount of said inventory afforded him sufficient means to decide on the relative positions of the spouses at the time of the death of the husband: but, in our opinion, this was clearly insufficient. His judgment however does not go further than recognizing the right of the plaintiff to recover one fourth part of her husband's estate; it is silent as to the amount which is to be recovered; but if after a final settlement and liquidation of the

succession, it should happen that the whole of it should be exhausted by the payment of the debts, such judgment would then become vain and nugatory.

EASTERN DIS.  
March, 1841.

HARRILL  
VS.  
HARRILL ET AL.

We think the Judge *a quo* erred. If the estate of the deceased had not been settled and liquidated at the time the suit was instituted, the action was premature and could not be maintained. However it is, there is no allegation in the petition going to show that such final settlement was ever made; it is a prerequisite which cannot be dispensed with, and not the slightest proof has been adduced not only to establish it, but even to show that there was no necessity for any such settlement. We must therefore presume, from the absence of allegations and evidence, that the deceased's succession has never been settled, and as from the state of the case, it does not appear to us that it is such as to be remanded for a new trial, our judgment must be one of non-suit against the plaintiff.

This view of the case renders it unnecessary to examine defendants' exceptions, and their motion for a new trial in the lower court.

It is therefore ordered, adjudged and decreed that the judgment of the probate court, be annulled, avoided and reversed, and that there be judgment for the defendants as in case of non-suit, with costs in both courts.

EASTERN Dis.  
March, 1841.

**WILLIAMS vs. BANK OF LOUISIANA.**

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF EAST BATON ROUGE.

**WILLIAMS**  
vs.  
**BANK OF LOUISIANA ET AL.**

The Court of Probates in ordering the sale of the property of a succession, necessarily possesses the power to *erase all mortgages* existing on it, and to give a clear title to the purchaser.

Probate Courts are authorized to exercise all such powers as may be necessary to enforce their jurisdiction; and to take cognizance of any matter arising from the consequences of the exercise of such jurisdiction.

The evidence of the Parish Judge is good in the court of probates as far as it goes to show the defendants assented to the sale and agreed to look to the proceeds of certain property for their claim.

The cashier acting as the agent of a bank is a competent witness to testify in relation to the collection of monies, settlement of its claims, and the sums of money due to and received by it.

Where property is mortgaged to the Bank of Louisiana, and is sold by the administrator of the estate to which it belonged, by order of the Probate Court; the bank, by the provisions of its charter is not bound by the proceedings alone, and the purchaser does not take the property free of incumbrance but subject to the bank's mortgage.

This case commenced under a rule, or proceeding in the Court of Probates for the Parish of East Baton Rouge, taken on the Bank of Louisiana and others, heretofore mortgage creditors of F. A. Browder, deceased, whose mortgages rested on a certain plantation, called the "Arlington Estate," purchased by petitioner at the probate sale of the succession of said Browder, to show cause in 25 days, why all the mortgages standing on the books of the recorder of mortgages, against the Arlington Estate, should not be *erased* and *cancelled*.

The Bank of Louisiana appeared and excepted to the jurisdiction of the court of probates; and for answer pleaded a general denial; and averred that their mortgages still exist on said property for a large balance of the debt due them by Browder's estate. They pray that the rule or suit be dismissed.

Upon these pleading and issues the cause was tried before

the Court of Probates. The facts of the case are fully stated in the opinion of this court.

EASTERN DIS.  
March, 1841.

The Judge of Probates was satisfied from the evidence exhibited in the case, the debts for which the mortgages had been given were all paid and extinguished. There was judgment erasing and cancelling said mortgages; and the Bank of Louisiana appealed.

WILLIAMS  
VS.  
BANK OF LOUISIANA ET AL.

*R. N. & A. N. Ogden*, for the plaintiff and appellee, submitted the case on a written argument.

*Brunot*, for the appellants argued on their behalf in writing, urging a reversal of the judgment and dismissal of the suit.

*Simon, J.* delivered the opinion of the court.

This case originated in a rule taken by the plaintiff on the Bank of Louisiana and other persons, to show cause why certain mortgages existing in their favor on the records of the recorder of mortgages of the parish of East Baton Rouge, on certain property formerly owned by F. A. Browder, deceased, since his death sold by virtue of an order of the Court of Probates of said parish, for the purpose of paying the debts of the succession, and purchased by the plaintiff, should not be erased from the record books of the said recorder of mortgages. The grounds alleged are that all the creditors, including the Bank of Louisiana, consented to the probate sale, and to exercise their claims upon the proceeds of the same; that several tableaux of distribution of said proceeds were filed and all the debts of the succession were fully paid off and discharged; and that by the effect of the probate sale and of the consent of the mortgage creditors, all the mortgages on the plantation purchased at the said sale by the plaintiff were released and extinguished.

The Bank of Louisiana first excepted to the jurisdiction of the Probate Court, pleaded the general issue, and averred that



EASTERN DIS. a certain mortgage still existed in their favor for a balance in March, 1841.

WILLIAMS  
VS.  
BANK OF LOUIS-  
IANA ET AL.

principal and interest yet unpaid by the estate of Browder, and amounting to \$4216, with interest. They prayed that the plaintiff's petition be dismissed.

The declinatory exception was overruled by the Probate Judge, who, after an investigation of all the matters in controversy, gave judgment on the merits in favor of the plaintiff, and ordered all inscriptions of mortgages existing on the property to him adjudicated, and among others, that of the Bank of Louisiana, to be erased from the records of the recorder of mortgages, &c. From this judgment the bank appealed.

The first question brought to our notice is that relative to the jurisdiction of the Court of Probates; and it is contended on the part of the appellants that said court is without jurisdiction *ratione materiæ*, and cannot in any manner grant any order or render any judgment affecting or changing the rights acquired by the bank under the mortgage. We think differently: The

The Court of Probates in ordering the sale of the property of a succession, necessarily possesses the power to erase all mortgages existing on it, and to give a clear title to the purchaser. application made by the plaintiff, may be considered as having for its object the perfection of a title to him transferred under the authority of the Court of Probates; the sale of the property made by virtue of an order of said court for the payment of the debts of the succession, was exclusively within its jurisdiction, and the power to sell must necessarily be understood to include also the power to give a clear title to the purchaser. It is true that Courts of Probate are courts of limited jurisdiction, but under the *art. 1037 of the Code of Practice*, they are authorized to exercise all such powers as may be necessary to enforce their jurisdiction, and this, in our opinion, clearly enables them to take cognizance of any matter arising from the consequences of the exercise of such jurisdiction.

Probate courts are authorized to exercise all such powers as may be necessary to enforce their jurisdiction; and to take cognizance of any matter arising from the consequences of the exercise of such jurisdiction. So, in the case of *Towles' administratrix vs. Weeks et al.*, 7 *La. Rep.*, 312, the Probate Court, on a rule to show cause, required and ordered the purchasers to comply with the terms and conditions of the sale of the property of the estate, although said court could not come to this conclusion without enquiring into

the validity of the title transferred to the said purchasers. So, *EASTERN DIS. March, 1841.* in the case of the *State vs. Judge Leblanc*, 5 *La. Rep.*, 329, and in that of *Zacharie's administrator vs. Prieur et al.*, 9 *La. Rep.*, 199, the power of the Judge of Probates to grant an order to erase and cancel certain mortgages existing on property which the applicant had purchased at a sale made under the authority of his court, was not questioned, for although the point was not raised or suggested, if the want of jurisdiction had been absolute, this court would have noticed it *ex officio*. The plea to the jurisdiction was therefore correctly overruled.

WILLIAMS  
VS.  
BANK OF LOUISIANA ET AL.

The record contains three bills of exceptions:

1. One taken to the opinion of the judge *a quo* permitting the plaintiff to show by the testimony of the parish judge that the bank had consented to the sale of the property mortgaged on the terms fixed by the administrator under the homologation of the court.

2. Another to the deposition of the cashier of the bank, introduced for the purpose of showing the circumstances under which a certain sum of money had been received by the bank, on account of the mortgage claim.

3. To the production in evidence of certain proceedings had before the Probate Court in relation to the estate of Browder, and particularly of the successive tableaux of distribution filed by the administrator and of an execution issued by the bank under the last tableau.

I. The evidence of the parish judge was certainly good, so far as it goes to establish facts tending to show that the bank assented to the sale, and to look to the proceeds of the property for their payment although such facts may not be conclusive proof of the consent.

II. The cashier, acting as the agent of the bank in the collection of the sums of money due to the institution, is a competent witness to show the facts and circumstances attending the payment of any such sums, and to establish how, by whom and for what purpose such payment may have been made.

The evidence of the parish judge is good in the Court of Probates as far as it goes to show the defendants assented to the sale and agreed to look to the proceeds of certain property for their claim.

The cashier acting as the agent of a bank is a competent witness to testify in relation to the collection of monies, settlement of its claims, and the sums of money due to and received by it.

EASTERN DIS.  
March, 1841.

WILLIAMS  
vs.  
BANK OF LOUIS-  
IANA ET AL.

III. This objection goes rather to the effect than to the admissibility of the evidence ; for, if the bank was no party to the proceedings, they were *res inter alios acta*, and could not produce any effect against them.

On the merits, the facts as established by the evidence, are mainly these: In March, 1831, John Linton, who was a creditor of the estate of Browder for a large amount, claimed the administration thereof. A short time afterwards, he was appointed administrator. In October following he convened a meeting of the creditors of the succession, which was held on the 23d of November; the Bank of Louisiana was duly notified, but did not attend. On the 24th of November, the proceedings of the creditors were homologated, and the sale of the property was ordered to take place according to the terms and conditions fixed upon by the meeting of creditors. The sale, however, was subsequently postponed until the month of February, 1832; and then, was again put off indefinitely. In the mean time, on the 19th of January, 1832, the board of directors of the Bank of Louisiana passed a resolution at the request of John Linton as administrator, that a suit be instituted on the bond due them by the estate, with the understanding that the purchaser of the mortgaged property should assume the payment of said bond, in three equal instalments at one, two, and three years; this had already been agreed upon and consented to in writing by the counsel of the bank. On the 12th of April ensuing, application was made by the administrator to the board of directors, to arrest the legal proceedings, which was assented to; and on the 18th of April, 1833, it was resolved, at the request of John Linton, that he be authorized *to proceed in the sale of the property mortgaged*, on his consenting to protect the bank against any loss which might arise in consequence of said sale. From this period until nearly one year after the sale of the property, repeated communications took place between the bank and John Linton, who had been twice renewed as administrator; several resolutions were

passed to indulge him, and to accept his individual responsibility, and various sums had been by him paid to the bank on account of the discount or interest; when on the 13th of October, 1834, after the death of John Linton, W. E. Thompson was appointed administrator. On the 12th of May, 1836, Thompson filed a tableau of distribution of the funds of the estate proceeding from the sale of the property; in which, after stating the different payments made to the bank as interests on bonds, &c., they are carried as mortgage creditors on the plantation and slaves for the sum of \$10,000, being the amount of the two bonds. This tableau was duly homologated on the 20th of June following, and became the judgment of the court. On the 27th of February, 1838, a second tableau was filed by Thompson, in which the bank is not mentioned; in this, it is represented that every debt is fully paid and that a balance of \$12,448 remains for the heirs. This tableau was also duly homologated. On the 10th of September following, the board of directors passed a resolution: "authorizing the cashier *to demand from* and inform W. E. Thompson, administrator of the estate of Browder, that unless the balance due to the bank by that estate, with interest, be immediately paid or *arranged for*, the bank will proceed and the cashier is authorized *to have proceedings instituted against him as administrator.*" On the 17th of November an execution was issued, at the request of the cashier *by order of the board*, against Thompson for \$10,000, under the decree of the Probate Court homologating the tableau, and on the 26th, the cashier gave the administrator the following receipt:

EASTERN DIS.  
March, 1841.  
WILLIAMS  
vs.  
BANK OF LOUISIANA ET AL.

"*Bank of Louisiana, 26th November, 1838. Received from W. E. Thompson, curator of the estate of F. A. Browder, ten thousand dollars principal, being judgment recovered, homologating the tableau filed of said estate by said W. E. Thompson on the 12th of May, 1836, and for which execution is now in the hands of the sheriff of this parish issued from*

**EASTERN DIS.** *the Probate Court of the parish of East Baton Rouge.—*  
*March, 1841. Signed W. E. Leverich, Cashier."*

**WILLIAMS**  
**VS.**  
**BANK OF LOUIS-**  
**IANA ET AL.**

The return of the sheriff shows that the execution was stayed by order of the bank, and subsequently returned.

According to the 31st, 34th and 35th sections of the charter of the Bank of Louisiana, 1 *Moreau's Digest*, 55; it cannot be doubted that the right of this corporation of causing the property mortgaged in its favor, to be seized and sold in whatever hands it may be, notwithstanding any sale or change of title by descent or otherwise, can in no manner be affected or impaired by the death or insolvency of their debtors, and the rule that after the death of the mortgagor, a sale of his property by order of the Court of Probates has the effect of raising the mortgage and of attaching it to the proceeds in the hands of the administrator, does not apply. It follows therefore that, where such property as is subject to the mortgage of the Bank of Louisiana, is sold by a curator or administrator of a succession, under an order of the Probate

Where property is mortgaged to the Bank of Louisiana and is sold by the administrator of the estate to which it belongs by order of the Probate Court, the bank by the provisions of its charter is not bound by the proceedings alone, and the purchaser does not take the property free from incumbrance but subject to the bank's mortgage. Court or in any other manner, the bank is not bound by the proceedings of the estate and that the purchaser does not acquire it free from incumbrance, unless the board of directors has consented to the sale or to the terms thereof, or has done such other acts as to show that the corporation has given its assent to being satisfied out of the proceeds thereof. Was the evidence in this case confined to the resolutions which were passed by the board of directors, at the request of the administrator, for the purpose of extending to him such indulgence as would give him the means of discharging the debt due to the bank out of any other funds of the estate but those proceeding from the sale, we should not be ready to infer from this circumstance alone that the bank has given such a consent to the sale as to deprive them of their hypothecary action against the third possessor of the property according to the charter; although the succession was administered as an insolvent estate, and although the bank, recognizing John Linton as ad-

ministrator, had treated with him in that character on various occasions. But the previous facts and circumstances connected with the resolution passed on the 10th September, 1838, in which the bank declares their readiness and determination to exercise their rights *against the administrator*, and to obtain *payment from him* out of the funds necessarily proceeding from the sale of the mortgaged property; with the execution issued against by virtue and *in consequence of the tableau* of distribution homologated by the court; and with the payment made by said administrator in compliance with the writ of execution, show conclusively that the Bank of Louisiana had, from the origin of Linton's administration, made themselves parties to the probate proceedings, had continued to do so, and had voluntarily relinquished any exemption they might have claimed from the general operation of the laws regulating probate sales. Indeed, it appears to us clear that they never intended that the property should be sold subject to their mortgage, but that on the contrary they always had in contemplation that they were to seek and obtain the satisfaction of their mortgage claim out of the proceeds of the sale, and having received *a large portion of said proceeds*, this may be fairly considered at least as a ratification of the sale; and, in our opinion the bank cannot now look to the property purchased by the plaintiff for the payment of any balance which may remain due; their remedy is against the administrator or against the heirs who, according to the last tableau, may perhaps have received from him the remainder of the funds of the succession.

It is therefore ordered, adjudged and decreed, that the judgment of the Probate Court be affirmed with costs.

EASTERN DIS.  
March, 1841.

WILLIAMS  
VS.  
BANK OF LOUISIANA ET AL.



EASTERN DIS.  
March, 1841.

OAKEY ET AL. *vs.* BANK OF LOUISIANA ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

OAKEY ET AL.

*vs.*

BANK OF LOUISIANA ET AL.

Demand of the maker of a note at *his* domicile, if he is absent, or at the place where it is made payable, is indispensable to fix or bind the endorser. The notary must find out the domicile.

A notary will not be allowed to testify to any thing which contradicts or strengthens his official acts as declared and set forth in his certificate of protest.

Where a note discounted in Bank, is not legally protested so as to bind all the endorsers, the Bank alone is responsible to the injured party by the neglect of the notary. There is no privity between this party and the notary, who is the agent of the Bank.

This is an action to recover from the Bank of Louisiana and William Christy, Esq., the notary of the Bank, the amount of two promissory notes signed by F. A. Blanc, payable to the order of A. Beauvais and by him endorsed. The petitioners allege, that they were the second endorsers on said notes, and that by the negligence and misconduct of the Bank and the said notary in making demand and protest, they have lost their recourse against Beauvais their previous endorser after having taken up and paid said notes under protest. They further show that at the time they paid the notes they were ignorant of the defective and illegal protest and paid through error; that they have since instituted suit against the first endorser and failed to recover for want of proper demand and legal protest in relation to the maker of the notes. They pray judgment against the Bank and notary, *in solido*, for the amount of said notes, interest and costs of their suit against the first endorser and all other costs together with damages.

The defendants severed in their answers, but pleaded the general issue, and denied specially any indebtedness to the plaintiff or liability.

Upon these pleadings and issues the cause was tried.

The evidence showed that the notary of the Bank had made a mistake in the protest of the notes in not making demand of

the maker of them *at his domicil*. It appears from the notary's certificate that he went to the house of Mr. Labatut in New-Orleans, to inquire for the maker of the notes, Mr. F. A. Blanc, "and was informed that he *resided in Point Coupée*." EASTERN DIS.  
March, 1841.  
OAKLEY ET AL.  
VS.  
BANK OF LOUIS-  
IANA ET AL.

Protest being made accordingly, it was shown by other evidence that he had not *removed* his domicil from New-Orleans, but was only absent in Point Coupée. On this proof the first endorser was discharged. The plaintiffs having taken up the notes as second endorsers, in ignorance of this circumstance and at the instance of the Bank, there was judgment in their favor against the Bank and the notary, *in solido*, for the amount claimed, and the defendants appealed.

*Thomas Slidell*, for the plaintiffs.

*L. Pierce*, for the defendants and appellants.

*Bullard, J.*, delivered the opinion of the Court.

The plaintiffs allege, that being endorsers of two promissory notes drawn by F. A. Blanc and endorsed also by A. Beauvais, which had been negotiated and become the property of the Bank of Louisiana, they took up the same on notice of protest and paid the amount to the bank, supposing that legal demand and protest had been made by the notary of the Bank. That they afterwards discovered, that in point of fact no legal demand had been made of the drawer, and that in consequence of such failure to show a legal demand, they had not been able to recover the amount of the previous endorser. They institute the present action against the Bank and the notary, to recover back the amount of the two notes, with costs of the suit against the endorser, and they pray judgment against both defendants, *in solido*. Judgment was rendered accordingly in the court of the first instance, and the defendants appealed.

The right of the plaintiffs to recover back from the Bank

**EASTERN DIS.** the amount of the two notes, depends upon their showing that  
March, 1841. they paid in error. The presumption resulting from the official  
**OAKLEY ET AL.** character and certificate of the notary, is, that due demand was  
VS. made of the drawer and the onus is upon the plaintiff to show  
**BANK OF LOUIS-** that no such demand was made. It is not enough to show  
**IANA ET AL.** that the plaintiffs failed to recover against their immediate en-

*L* Demand of the maker of a note at his domicil, if he is absent, or at the place where it is made payable, is indispensable to fix or bind the endorser. The notary must find out the domicil.

endorser in a case in which the Bank was not a party.

The notary certifies in his protest, "that he made diligent inquiry for the drawer of said note in order to demand payment, and was informed by Mr. Labatut, that he resides at Pointe Coupée, in this State, and is not now in the city—whereupon he protests, &c." The evidence in this cause, as well as in that of the plaintiffs against their endorser, is entirely satisfactory, that the drawer had his domicil in New-Orleans, at the time of the maturity of the note, and that no demand was made of him in or at his domicil, as required by law to fix the liability of endorsers.

But the defendants counsel has called our attention to a Bill of Exceptions, taken to the refusal of the Court to admit as a witness the notary by whom the protest had been made, and who was also a party defendant in this case; admitting that the plaintiffs could not deprive the Bank of the testimony of their agent, by making him a party, yet it appears to us the Court did not err in rejecting him as a witness. The Bank

had already the advantage of the official act and certificate of the same notary, which he could neither contradict nor strengthen by any verbal statements.

Where a note, discounted in Bank, is not legally protested so as to bind all the endorsers, the Bank alone is responsible to the injured party by the neglect of the notary. There is no privity between this party and the notary, who is the agent of the Bank.

The right of the plaintiffs to recover of the notary, himself, *in solido* with the Bank, depends upon other principles. There is no privity between the plaintiffs and the notary who was the agent of the Bank, and not theirs. Those cases in which notaries have been held responsible for neglecting to make proper demand or to give due notice of protest were between such notaries and those by whom they were employed.

It is, therefore, ordered, adjudged and decreed, that the

*I. 79m 364. 20m 183. 10m 643. 2 N. 571  
 4 N. 186. 62m 727. 102m 485. 112m 487  
 142m 391.*

judgment of the District Court, be affirmed, so far as it relates to the Bank of Louisiana, with costs; but that it be reversed and annulled, as it relates to the defendant, William Christy, and that ours be for him, with costs in both Courts.

EASTERN DIS.  
March, 1841.

PIERCE  
VS.  
MUSSON.

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PIERCE vs. MUSSON.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT:

A co-proprietor is at liberty to increase the height of his wall, held in common at his own expense; and if the common wall is unable to support the additional weight of the new one, he is bound to rebuild it anew, at his expense, taking the additional thickness from his own property.

But an adjacent proprietor has no right to cut away part of the foundation of his neighbor's wall or house, or to cause the projections of his wall to rest on that of his neighbor, if it cause injury or damage, and for which he is responsible if he exercises this right without due precaution.

The appointment of experts is a mere precaution and will not have the effect of discharging the neighbor from the obligation of *repairing the injury* caused by the new work.

So where the defendant cut away part of the foundation of plaintiff's wall, and erected his new one thereon, causing damage by cracking and breaking plaintiff's wall, he is liable for all the damage occasioned thereby.

It is no excuse against payment of these damages, that the plaintiff made no opposition or objection to the erection of defendant's new wall. The latter made his work at his own risk.

This is an action to recover damages for injury and damage done to plaintiff's house and partition wall, by the defendant in erecting a new wall, by cutting away part of the foundation of the old and placing the projection of the new one thereon.

The plaintiff alleges that his wall was substantial and fully adequate to support the building originally intended, but that the defendant cut away one half of the foundation of his wall and erected upon and against it, a massy wall and building of granite, by reason of which his wall cracked and sunk, and

EASTERN Dis. was much injured to his great damage; depriving him of the  
*March, 1841.*

PIERCE  
vs.  
MUSSON.

enjoyment of his residence, and rendered it necessary to be at great expense in repairing and rebuilding the same. He prays for judgment allowing him 8000 dollars in damages for the injury done to his wall by the fault and illegal conduct of the defendant.

The defendant pleaded a general denial.

The District Judge after examining the law and authorities, and summing up the case, decided :

1. That by the 677th and 678th articles of the Civil Code, every co-proprietor of a wall held in common, may increase the height of said wall ; but if such wall cannot support the additional weight of raising it, he who wishes to have it made higher, is bound to rebuild it anew entirely.

2. That the wall against which the defendant built was a common wall, and that instead of building upon it, or rebuilding it anew, the defendant materially weakened and injured it, by cutting away a considerable portion of its foundation ; which he had no right in law to do.

3. That by such illegal proceeding of the defendant, the plaintiff has sustained damage to the amount of sixteen hundred and thirty-nine dollars, to wit: four hundred dollars for rent of house, twelve hundred dollars for repairs, and thirty-nine dollars for taking down and putting up grates and chimney pieces.

4. That by the article 2294 of the Civil Code, every man is obliged to repair the damage which by his act has been caused to another.

There was judgment in favor of the plaintiff for \$1,639, and the defendant appealed.

*Benjamin & Eustis*, for the plaintiff.

1. The evidence shows damage to the plaintiff by the act of defendant's agents to the full amount of the judgment. These

acts were done to the knowledge of defendant who did not forbid them, and is therefore liable. La. Code, 2294, 2299. EASTERN DIS:  
March, 1841.

2. The plaintiff's house has been injured by damage done to the common wall, and the weight of evidence shows the acts of defendant to have been ill-advised and imprudent. If the boundary wall was insufficient for the new building, his remedy was pointed out by the Code 678, i. e. taking it down and rebuilding it. By adopting another course he has assumed the risk of the damage which was a consequence of his act.

PIERCE  
VS.  
MUSSON.

3. The defendant should have notified plaintiff of his intention of cutting away part of the common wall, so that the plaintiff might have used the necessary precautions to prevent damage. His failure to give this notice renders him liable to pay all damages.—See Civil Code 681. Paillet on art. 662 of the Fr. Code which is the same as art. 681 of the La. Code. See also 3 Touillier, No. 206 and seq.—3 Duranton, 329 and seq.

4. Even if defendant had succeeded in proving the method adopted by him to have been the most cautious and prudent that could be devised, which is far from being the case, he would still be bound to reinstate his neighbour's building as it was before. The law on this point is positive. He may subject his neighbour to any *inconvenience* rendered necessary to enable him to effect his contemplated improvement, his neighbour must submit. This is one of the consequences of their joint ownership of the wall.—But he cannot subject his neighbour to any *expense*.—He must reinstate things as they were before in his neighbour's house. If he builds a new wall he must plaster it, repair the roof where broken, and even reinstate ornamental work, erected by his neighbour on the party wall. If as in the present case he causes the walls to crack and sink, the floors and openings to be displaced, the plastering to be destroyed, he must make good the damages. See La. Code, art. *suprà*.—The French authorities above cited.—Pardessus, *Traité des Servitudes*—Favard de Langlade *verbo servitude*.



EASTERN DIS.  
March, 1841.

*Mazureau*, for the defendant and appellant.

PIERCE  
vs.  
MUSSON.

*Simon J.* delivered the opinion of the court.

Plaintiff alleges that he is the owner of a lot of ground on which there is a two story brick dwelling house; that his said lot is bounded on one side by the property of the defendant, and that the side wall of his said house was built as authorized by law, one half on his own ground and the other half on defendant's, so as to be a wall in common between him and said defendant. He complains that the defendant having demolished his building which rested against said wall, cut away that part of the foundation thereof which was laid on his land, so that the wall, originally well and substantially built, immediately sunk and gave way, and occasioned the cracking of his other walls. That the defendant, after cutting away one-half of the said foundation, proceeded to construct against said wall, granite buildings of uncommon size and weight, which the wall was evidently insufficient to support, in consequence of which he has been injured to the amount of \$8000 damages; he prays judgment for said sum. The defendant pleaded the general issue, and judgment having been rendered against him for \$1639 damages, said defendant appealed.

The evidence shows that at the time defendant was about commencing to build, he called upon two architects (Messrs. Gurlie and Pilié) to examine the partition wall, and to give their opinions on its solidity; they found it strong enough, except that the base of the foundation was not sufficiently wide; defendant was anxious to do nothing that would injure his neighbour's house; their advice was to cut away a part of the foundation of the party wall on defendant's side, so that the new wall might settle down upon it with touching the projections of the other wall. This projection, (*l'empattement*) being about six inches on defendant's ground, was accordingly removed in the manner proposed by the architects, by cutting it down perpendicular with the wall, and a new foundation was built close adjoining the

old wall, and a new wall raised upon the new foundation. Other witnesses were examined, who stated that in their opinion, all damage to plaintiff's house might have been avoided by taking down the partition wall and rebuilding it entirely new and of sufficient strength to bear the building of defendant; that the erection of defendant's building, has caused the plaintiff's house to sink considerably, this being the natural consequence of cutting away any part of the foundation of the party wall, and of building another wall against it. One of the witnesses (William Brand) says that he saw the persons employed in digging the foundation of defendant's house; that they were digging away part of the foundation of the wall of plaintiff's house, and were about laying a foundation for the wall of defendant's house partly under that of plaintiff; that he observed to them that they would injure the plaintiff's house or cause it to fall; that in building up the wall of defendant's house, said wall after the height of about 28 feet projects about six inches in the other wall and rests upon it, and he considers the digging away the foundation of plaintiff's house as being the sole cause of the damage done to it. This evidence is corroborated by the testimony of D. H. Twogood, who swears that after having examined the wall in question, he found that defendant's wall projects in that of plaintiff's where it is a brick and a half thick from four to six inches. Several witnesses have also been heard to fix the amount of damages, and they generally estimate the expenses of the necessary repairs from \$1200 to \$1500, besides the loss of rent, &c.

We are satisfied from the evidence that the damage complained of has been occasioned by the erection of the defendant's new wall close adjoining the old one, after having cut away the projecting part (*l'empattement*) of the foundation of the plaintiff's house on the defendant's side; and that the projecting of the defendant's wall in that of plaintiff's at a certain height, must have also greatly contributed to its destruction and to the cracking and sinking of the other walls. The de-

EASTERN DIS.  
March, 1841.

PIERCE  
VS.  
MUSSON.

EASTERN DIS.  
March, 1841.

PIERCE  
vs.  
MUSSON.

fendant would therefore be responsible for the damages caused by his new work, unless he can show that he has done nothing but exercising a faculty allowed him by the laws of his country, or has satisfactorily proven that the plaintiff has consented to the manner in which the wall has been erected.

A co-proprietor is at liberty to increase the height of his wall held in common at his own expense; and if the common wall is unable to support the additional weight of the new one, he is bound to rebuild it anew, at his expense, taking the additional thickness from his own property.

It is perfectly clear that according to the *arts. 677 and 678* of the Louisiana Code, every co-proprietor is at liberty to increase the height of the wall held in common, provided it be done at his own expense; and if the common wall cannot support the additional weight of raising it, *he is bound* to rebuild it anew entirely, at his own expense, and the additional thickness must be taken from his property. The legal faculty in such a case appears therefore to be limited to increasing the height of the wall held in common, and when this cannot be done, owing to its insufficiency, to its being rebuilt anew entirely by the neighbour who wishes it to be made higher; he is bound by law to do so, and although such a privilege may be used without the consent of the other co-proprietor, it is nevertheless one which cannot be exercised with too much care and attention; *Toullier, vol. 3, No. 204; Duranton, vol. 5, No. 330; 13 La. Rep., 273.* But when one of the neighbours does not choose to exercise the faculty which the law allows him, and prefers erecting another wall close adjoining his neighbour's, is he at liberty to do so by undermining his said neighbour's foundation, cutting away the projecting part of it (*l'empattement*) or doing any other work which may prove injurious in its consequences, without obtaining his neighbour's consent? Can he say that he is using a legal faculty? It is a principal of law, "*although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it which may deprive his neighbour of the liberty of enjoying his own, or which may be the cause of any damage to him; La. Code, art. 663; and the art. 681 informs us that "neither of the two neighbours can make any cavity within the body of the wall held by them in common, nor can he AFFIX TO IT ANY WORK*

WITHOUT THE CONSENT OF THE OTHER, or without having, ON HIS REFUSAL, caused the necessary precaution to be used, so that the new work be not an injury to the rights of the other, to be ascertained by persons skilled in building," These provisions of our laws demonstrate sufficiently that the defendant had no right to cut away a part of the foundation of the plaintiff's house, nor to cause the projection of his wall to rest on the plaintiff's without exercising such precaution as to avoid injuring said plaintiff's property; *Toullier, vol. 3, No. 206*; and even then, if one of the neighbours takes upon himself not to use the faculties allowed him, and to attain his object by some other means but those pointed out by law, he becomes necessarily responsible, notwithstanding his precautions, for the consequences of his acts, if the new work by him erected becomes an injury to the rights of his neighbour. *Toullier, vol. 3, No. 207*, says: "*S'il s'agit d'ouvrages auxquels il ne doit pas contribuer, ni pour lesquels on ne soit pas obligé d'entrer chez lui, celui qui veut les faire peut se borner, aux termes de l'art. 662 (the same as the article 681 of the Louisiana Code) à requérir le consentement par une simple notification par un hussier; et en cas de refus de consentir, faire régler par experts les moyens nécessaires, pour que le nouvel ouvrage ne soit pas nuisible aux droits de l'autre voisin; SAUF SA RE-*

EASTERN DIS.  
March, 1841.

PIERCE  
vs.  
MUSSON.

But an adjacent proprietor has no right to cut away part of the foundation of his neighbour's wall or house, or to cause the projections of his wall to rest on that of his neighbour, if it cause injury or damage, and for which he is responsible if he exercise this right without due precaution.

The appointment of experts is a mere precaution, and will not have the effect of discharging the neighbour from the obligation of repairing the injury caused by the new work.

SPONSABILITE PERSONNELLE; ET LES DOMMAGES ET INTERETS AUXQUELS IL POURRAIT ETRE CONDAMNE, SI LES EXPERTS S'ETAIENT TROMPES, et que l'ouvrage fut nuisible aux droits de l'autre voisin. See also, *Duranton, vol. 5, No. 337*. It is obvious

therefore that the appointment of experts is a mere precaution, and cannot have the effect of discharging the neighbour from the obligation of repairing the injury caused by the new work; and we have no hesitation in concluding that the defendant cannot properly be said to have exercised such a legal faculty as not to be subjected to the responsibility resulting from the consequences of his acts, and that although it has been shown that he was anxious to do nothing that would injure plaintiff's

So where the defendant cut away part of the foundation of plaintiff's wall, and erected his new one thereon, causing damage by cracking and breaking plaintiff's wall, he is liable for all the damage caused thereby.

EASTERN DIS. house, the circumstances of the case are such that he is un-  
March, 1841. doubtedly bound to repair the damage caused by the erection  
 of his new work.

PIERCE  
 vs.  
 NUSSON.

It is no ex-  
 cuse against  
 payment of these  
 damages, that  
 the plaintiff  
 made no opposi-  
 tion or objection  
 to the erection of  
 defendant's new  
 wall. The lat-  
 ter made his  
 work at his own  
 risk.

But it has been strenuously contended that the plaintiff ought to have made opposition to the defendant's work in due time ; that said work was undertaken and carried on in the presence and within the knowledge of the said plaintiff who did not even manifest any dissatisfaction ; that from his not having taken any measure to arrest the progress of the work, and suffering the wall to be built and completed, his silence must be interpreted as a tacit and implied consent on his part, and we have been accordingly referred to the *arts.* 1805, 852, 853, 854 and *seq.* of the Louisiana Code. We are not ready to accede to this proposition. The terms of the *art.* 681, seem to require more than a tacit or implied acquiescence resulting from the silence of the party ; it contemplates, in our opinion, a direct and express consent, such as to be susceptible of being refused when called for ; and *Toullier*, vol. 3, No. 206, goes so far as to say : "*La prudence exige de requérir un consentement écrit : la preuve testimoniale que le voisin aurait consenti ne serait pas reçue ; car il s'agit d'un droit foncier dont la valeur est indéfinie.*" This certainly shows the fallacy of the argument that, the plaintiff consented because he did not make opposition ; for, if parol evidence of a positive consent cannot be admitted, less so can it be inferred from the silence of the party. In a case like the present, how could the plaintiff's inaction be so construed as to imply a tacit consent ? he is neither a mason nor an architect, and he could not therefore judge of the solidity or of the consequences of the construction ; he was aware that his neighbour had no intention of injuring his rights, and was consequently fully confident that the defendant would take all the necessary precautions to avoid, as much as possible, an injury to his property ; it has not been shown that defendant ever communicated his plan of construction to the plaintiff ; and even had he done so, said plaintiff would have been unable to give

his assent *avec connoissance de cause*, without the assistance of persons skilled in building. There may be cases in which a contract may be tacitly and impliedly assented to, according to to the *art. 1805 and 1811 of the La. Code*, but this, in our opinion, is not one of those in which, from the circumstances, the party can be supposed *by his silence or inaction* to have given an implied assent to a proposition, which, it may be remarked, never was made by the defendant to the plaintiff in any other manner but by certain illegal acts, which the other, knowing the extent of his legal rights, and the responsibility assumed by his neighbour, did not think necessary to forbid.

With this view of the case, we think the judge *a quo* did not err in giving judgment against the defendant for the amount of damages proven to have been sustained by the plaintiff.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

EASTERN DIS.  
March, 1841.

REYNOLDS,  
BYRNE & CO.,  
vs.  
FELICIANA  
STEAM BOAT CO.

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**REYNOLDS, BYRNE & CO. vs. FELICIANA STEAM  
BOAT COMPANY.**

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF WEST  
FELICIANA, THE JUDGE OF THE PARISH COURT PRESIDING, *ad interim*.

An appeal, taken to a return day which is changed by law to a more distant day, and the record is not filed on the first, but on the *last return day*, will not be considered as *abandoned*; it is filed in proper time.

In a suit for a liquidation among stock-holders of an incorporated company, it cannot be legally tried, nor judgment rendered, unless all the parties have been cited, answered or judgments by default taken against them.

Stock-holders in an incorporated company, cannot be rendered liable *in solido*.—  
The corporators are only liable in proportion to the stock each one holds.



**EASTERN DIS.** The fact that the stock-holders are made liable for losses, beyond the amount  
**March, 1841.** of the capital stock, does not make each stock-holder liable *in solido*, but  
 only proportionably according to the number of shares held by him.

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**REYNOLDS,**  
**BYRNE & CO.,** Although the want of proper parties can in general only be taken advantage  
 of by exception or plea; yet if the plaintiff singled out a part of those who  
 were parties and took judgment against them, while as to others the cause  
 is continued, it may be assigned as error apparent on the record.

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**VS.**  
**FELICIANA**  
**STEAM BOAT CO.**

This is an action to recover the sum of \$7,934 from the Feliciana Steam Boat Company, with ten per cent. interest; it being for advances made in cash, for commissions for accepting, and for the plaintiff's salary under special contract with the company, for \$1000 for the year 1827; all of which more fully appears by an account annexed.

The plaintiffs commenced suit in April, 1830, and allege that the charter of said company has expired, and being themselves stock-holders, they are desirous of having its affairs liquidated and settled; therefore to establish their demand and recover its amount, and also to settle and liquidate the company's affairs, they institute this suit. They then set out the names of all the stock-holders known to them, and pray that they be cited; and also that they be required to make known such others as may have been omitted. Interrogatories are propounded requiring each stock-holder to state on oath, if he is a stock-holder and what are the number of shares owned and held by each; and to state if they know any other stock-holders and to name them. Amended petitions succeeded each other and were filed from time to time, from 1830 until 1839, bringing in new parties as the names of additional stock-holders were disclosed; and also citing in the heirs of those who in the meantime died off.

Several of the stock-holders, made defendants appeared; excepted to the plaintiffs' right to maintain this action until a settlement of the affairs of the company be first had, its funds and means ascertained and the liability of each share-holder made known. That they are only liable for their proportion of any loss that may be shown. Some of them set up debts

and demands against the company. They pleaded the general issue and put the plaintiffs on strict proof of their claim.

EASTERN DIS.  
March, 1841.

Some of the defendants excepted that the petition did not contain a clear and concise statement of the objects of the demand, the nature of the claim and cause of action; and that no definitive judgment could be rendered on it.

REYNOLDS,  
BYRNE & CO.,  
VS.  
FELICIANA  
STEAM BOAT CO.

A number of orders, motions and judgments by default were made, taken and set aside during the pendency of the case.

Finally on the 18th December, 1839, judgment by default was made final against a portion of the defendants; and continued as to *some*. Among those against whom judgment was rendered *in solido*, were the present appellants, Laurent Milaudon and James Dick. These two, took a separate appeal, and are the only parties defendant *now* before the court.

*Morgan*, for the appellants, assigned errors.

The appellants assign as errors apparent on the face of the record.

1. The action is essentially joint and no proceedings could legally be had and no judgment rendered until all the corporators or copartners were made parties. Louisiana Code, 2080, 2081, 2082.

2. If this suit is instituted to recover a specific sum of money it should be dismissed, because nothing but a liquidation and settlement among the stockholders could be sued for—6 N. S., 83 Woods *vs.* S. B. Fort Adams.

3. In a suit for liquidation among the stockholders the cause should not have been tried, nor could judgment have been rendered against any one of them—the judgment could only have established the balance due.

4. In a suit for liquidation among stockholders the cause cannot be legally tried nor judgment rendered unless all the parties have been cited and answered, or judgments by default taken against them. In this case, the cause was taken up and tried only or against a few of the defendants, and judgments

EASTERN DIS.  
March, 1841. were rendered against them *in solido*. Some of the defendants had not even been cited.

REYNOLDS,  
BYRNE & CO.,  
VS.  
FELICIANA  
STEAM BOAT CO. 5. The defendants cannot be rendered liable *in solido*; they were stockholders in an incorporated company, and under the provisions of the charter they are only liable if at all for losses sustained by the company. 1 Moreau's Dig. 261. See act of incorporation.

6. The judgment of the court below is vague, uncertain and indefinite; it does not ascertain the amount for which the defendants are liable, nor does it respond to the prayer of the petition.

7. Justice requires that the judgment should be reversed, and the action dismissed, or at least that the cause should be remanded to the court below.

*Curry*, acting for James Turner, Esq., counsel for the plaintiffs, made the following points:

The plaintiffs and appellees move to dismiss the appeal on several grounds:

1. It appears there are two appeals; the first is taken in March, 1840, returnable to the *June term*, to which the appellees are cited, but the record was not filed; so that this appeal must be considered as *abandoned*; as the appellant is bound to bring up the transcript and *file it on the return day*, or within three judicial days afterwards, or obtain time, which is not pretended here; Code Practice, 587, 88, and 89.

The second appeal was granted in December, 1840, and returnable to the February term, 1841, and the record filed. But the appellant is not entitled to a second appeal if he abandon's the first. C. Pr: art. 594. 11 *La. Reports*, 380; *Smith et al. vs. Vanhille, et al.*

2. It is urged that the act of 20th March, 1840, fixing the appeals from the 3rd judicial district, for trial in February, and making them returnable to the second Monday of February, *thereafter*, makes the first appeal good by filing the record on

the second Monday in February, instead of the first Monday in June, to which the appeal was returnable. This act it is believed, only transferred the appeals taken to the June term, to February for trial; but that all the records should have been filed on the return day or within 3 judicial days afterwards. See *session acts of 1840 page 56.*

EASTERN DIS.  
March, 1841.

REYNOLDS,  
BYRNE & CO.,  
vs.  
FELICIANA  
STEAM BOAT CO.

3. This cause cannot be examined on the merits, because, so far as regards the present appellants the judgment appealed, was taken by default and made final, without any of the evidence being taken down in writing; and there is no statement of facts, or bills of exceptions or assignment of errors. For these reasons and grounds the appeal should be dismissed.

The appellants having been allowed to file an assignment of errors on the trial, being within ten days after filing the record, the plaintiffs in reply contend that the judgment should be affirmed as it now stands for the following reasons.

1. The action is against partners, stockholders or corporators, who are not only jointly but *severally bound*, or liable *in solido*, because the Feliciana Steam Boat Company is or was a commercial partnership, in which each partner or stockholder is liable for the whole debt due by the company.

Claiborne et al. *vs.* their creditors, 13 La. Reports, 279. Vigers et al. *vs.* Sainet. *Idem* 300.

2. It is urged, that all the stockholders were not made parties and that judgment cannot be taken against a part of them, unless all of them have been cited and answer. If this be the law, it cannot be assigned as error. The want of proper parties can only be taken advantage of by plea.

In this case, the evidence in which judgment was rendered is not in the record; and nothing can be assigned as error which could have been cured by legal evidence.

4. If the judgment here is viewed as an interlocutory one, for a specific sum owing the plaintiffs by the company; leaving the balance of the suit for the liquidation and settlement

EASTERN DIS among the stockholders still open ; then an appeal *will not lie*  
March, 1841. and the present appeal should be dismissed.

REYNOLDS,  
 BYRNE & CO.,  
 vs.  
 FELICIANA  
 STEAM BOAT CO.

There is no apparant error on the face of the judgment appealed from. It is for a specific demand against the defendants *in solido*. They are certainly liable in that capacity both from the principles of law, the decisions of this court, and even by the terms of their charter ; the last section of which provides that each of the stockholders shall *be liable* beyond the amount of his stock and in his individual capacity ; see charter, 1 Morau's Digest, 261.

6. It is objected that the judgment is vague and does not show the sum for which the defendants are liable. The judgment is for a specific sum, and the credit can be ascertained from the tenor of the judgment. *Id certum est, &c.* But it does not follow by any means because a judgment presupposes some further action of the court that it is therefore erroneous ; it may not be final as to the whole matter ; nothing is more common than several judgments rendered in the different stages of suits for the settlement of partnership accounts, or of corporate companies. Some matters are by interlocutory judgments sent before arbitrators or masters in chancery for settlement ; other matters put in issue are settled by definitive judgments. This is the common practice in chancery and is peculiarly applicable to our system ; being a proceeding both in law and equity in the same suit. It is common to our jurisprudence and is done every day.

7. There is nothing in the final part of the judgment that is erroneous, and the first part of it, to wit : for the amount of the plaintiff's demand, cannot be appealed from, as there is no evidence to show it was improperly given or for a wrong sum.

The appellees obtained the certificate of the clerk of this court, that the record was not filed at the June term, 1840, and execution issued on the judgment. It should be affirmed with costs.

*Morgan*, for defendants, in reply.

EASTERN DIS.  
March, 1841.

1. The first point made by the counsel for the appellees cannot be sustained, because there is no evidence that the appeal taken in March, 1840, was ever *abandoned* by the appellants, nor is such the fact, as is shown by their bringing up with the record the petition and citation of appeal. The statute approved 20th of March, 1840, had the effect of postponing the filing of the appeal until the 2d Monday of February, 1841, as has been recently held by the court in the case of *Bostwick vs. his creditors*, and the certificate granted by the clerk of this court in June, 1840, improperly issued. The appeal taken in December, 1840, was only asked for out of great caution and if unnecessary as we conceive it to have been, cannot prejudice the rights of the appellants under the first order granting an appeal. The case of *Smith vs. Vanhile et al.*, 11 La. Rep. 380, relied on by appellees, shows that at least the appeal taken in December, 1840, must be sustained.

REYNOLDS,  
BYRNE & CO.,  
vs.  
FELICIANA  
STEAM BOAT CO.

2. The statute approved, 20th March, 1840, p. 56, went into operation *instantly*, and abolished the previous laws, and at the same time did away with the June term of this court, for the trial of appeals from the parish of East and West Feliciana. It cannot be maintained that it, "only transferred the appeals taken to the June term to February for trial;" because, it provides that from and after the passage of the act, there shall be but one return day from those parishes, and that is the 2d Monday of February.

3. The third point cannot be sustained, because there is no method pointed out by law, by which a party against whom a judgment has been rendered final by default, can obtain a statement of facts.

4. On the merits it is submitted that the judgment of the court below, is clearly erroneous; and that the assignment of errors filed by the appellants must be sustained.

The cases cited by the counsel for appellees on the first point made by him do not apply to this case. Commercial co-part-



**EASTERN DIS.** ners where the co-partnership is created by contract between  
March, 1841. the parties, whether by act under private signature or authentic,  
**REYNOLDS,** it is admitted are bound jointly and severally; but the plaintiffs  
**BYRNE & CO.,** and defendants in this case were members of a body corporate  
**vs.** created by the legislature of this State; See 1 Moreau's Dig.,  
**FELICIANA** p. 261. As corporators each was only bound to the amount  
**STEAM BOAT CO.** of his stock and no further, unless *losses* were sustained by the  
company, to an amount greater than the capital; Code of 1818,  
p. 88, arts. 11 and 12; same Code, arts. 427, 428; see also  
proviso to statute above referred to.

5. In answer to the fourth point made by appellees. The court will perceive that the judgment is not interlocutory, and has not so been considered by the plaintiffs, for as has been stated by their counsel, they have taken out execution in the court below for the full amount of the judgment without any reservation, and this shows conclusively the error in the proceedings in the court below.

The court will perceive from the petition that there is no averment that the parties were commercial co-partners, nor is it averred that any losses were sustained by the company; and it will not presume that facts not alleged were proven.

Referring to the assignment of errors on file, it is respectfully submitted that the judgment of the court below should be reversed and the cause sent back to be tried between all the parties.

*Bullard, J.* delivered the opinion of the court.

The plaintiffs represent in their petition that the Feliciana Steam Boat Company is largely indebted to them for goods sold and advances made to the company, and for their salary as agents under special contract. That the charter of said company has expired by its own limitation, and that the petitioners being themselves stockholders are desirous of having the affairs of the company liquidated and finally settled, and for that purpose and to establish their demand and to recover the amount

thereof they institute the present action. They then set forth the names of the stockholders as far as known to them, and they conclude by praying for citation, and that the affairs of the company may be settled and liquidated, and that they pay their debts, and that the demand of the plaintiffs may be ordered to be paid with interest at ten per cent. Various amended and supplementary petitions were filed from time to time making new parties as the names of the stockholders were discovered. The suit was brought in 1830, and finally in 1839, some of the defendants, the alleged stockholders, not having answered, judgment by default was ordered against them, and as to the present appellants, James Dick and Laurent Millaudon, was made final, condemning them and some others in solido, to pay the whole amount of the plaintiff's demand, making allowance for what the plaintiff's themselves owed as stockholders, in proportion to the number of shares held by them.

The appellees have moved to dismiss the appeal on the ground that a former appeal which was allowed, was abandoned by the appellants. We do not think the appeal first taken in this case was abandoned in the sense of article 594, and the motion is overruled; 11 La. Rep., 382.

The case is before us upon various assignments of errors apparent on the record. Two only of the errors assigned, to wit: the 4th and 5th, need be noticed, because the opinion we have formed upon them is decisive.

4th. In a suit for a liquidation among stockholders the cause cannot be legally tried nor judgment rendered unless all the parties have been cited and answered or judgments by default taken against them. In this case the cause was taken up and tried only as against a few of the defendants and judgments were rendered against them in solido. Some of the defendants had not even been cited.

5th. The defendants cannot be rendered liable in solido.

EASTERN DIS.  
March, 1841.

REYNOLDS,  
BYRNE & CO.,  
ES.  
FELICIANA  
STEAM BOAT CO!

An appeal taken to a return day which is changed by law to a more distant day, and the record is not filed on the first, but on the last return day, will not be considered as abandoned; it is filed in proper time.

In a suit for a liquidation among stockholders of an incorporated company, it cannot be legally tried, nor judgment rendered, unless all the parties have been cited, answered or judgments by default taken against them.

Stockholders in an incorporated company cannot be rendered liable in solido. The corporators are only liable in proportion to the stock each one holds.

**EASTERN DIS.** They were stockholders in an incorporated company, and under the provisions of the charter they are only liable, if at all, for losses sustained by the company.

**REYNOLDS,  
BYRNE & CO.,  
VS.  
FELICIANA  
STEAM BOAT CO.**

We are of opinion that both assignments are well taken. It was irregular and even inconsistent with the prayer of the petition to proceed and take a final judgment against a part of the stockholders, leaving the case still pending as to others; much less, in our opinion, were the plaintiffs entitled to a judgment against the defendants in solido. The plaintiffs as well as defendants were members of an incorporated association. The corporators at the time the debt was contracted were liable in proportion to the shares of stock which each one held. After the dissolution of the company by the expiration of the charter, their condition did not become more onerous in relation to each other, although as to debts which may have been contracted afterwards the corporators, considered as voluntary co-partners in a commercial concern, may have become liable in solido as to third persons.

The fact that the stockholders are made liable for losses beyond the amount of the capital stock, does not make each stockholder liable in solido, but only proportionably according to the number of shares held by him.

It is however contended by the counsel for the appellees that by a proviso to the charter each of the stockholders is declared to be liable beyond the amount of his stock and in his individual capacity. The proviso is, that, notwithstanding the corporate character of this association, the stockholders shall not be exempt from personal responsibility for losses which may be sustained beyond the amount of the capital stock; 1 Moreau's Digest, 261. By that we understand that as it relates to losses sustained by the company the liability of each stockholder shall not be confined to the amount of his stock. But it does not follow, that each is liable, in solido, even towards third persons, for the whole of such loss sustained or debts contracted; and still less that one of the corporators who becomes a creditor of the company and consequently owes his own proportion of his debt, can recover from any one of his co-corporators, or all of them in solido, the balance due him.

In answer to the first clause of the fourth assignment of error, it has been said by the counsel for the appellees, that the want of parties and the ground that all having an interest were not made parties, cannot be assigned as error but can be taken advantage of only by exception or plea. Admit that principle to be correct, yet the error appears to us to consist in having singled out a part of those who were parties and taking judgment final against them, while, as to others, the cause was laid over and appears yet to be pending. This is especially irregular and erroneous in a case having professedly for its principal object to liquidate the concerns of the company, and secondarily to obtain the payment of a claim for advances by one of the co-partners.

It is therefore adjudged and decreed that the judgment of the District Court be reversed, and the case remanded for further proceedings, according to law, the plaintiffs and appellees paying the costs of this appeal.

EASTERN DISTRICT,  
March, 1841.

ROUANET  
vs.  
HUNT, TUTOR,  
&c.

Although the want of proper parties can in general only be taken advantage of by exception or plea; yet if the plaintiff singled out a part of those who were parties and took judgment against them, while as to others the cause is continued, it may be assigned as error apparent on the record.

### ROUANET vs. HUNT, TUTOR, &c.

APPEAL FROM THE COURT OF THE SECOND DISTRICT, FOR THE PARISH OF LAFOURCHE  
INTERIOR, THE JUDGE THEREOF PRESIDING.

All statutes or laws in *pari materia* ought to be construed together in order to ascertain the meaning of the legislator.

The article 904 and two following of the La. Code, in both languages, when construed together and interpreted according to the spirit and intention of the legislature, provide only that *ascendants or donors*, are entitled to inherit to the exclusion of all others, the real property and slaves *given* by them to their children, or their descendants, *who die without issue*, when these objects are found in the succession.

**EASTERN DIS.** The right to inherit, or right of return or reversion allowed by law to the donor  
**March, 1841.** does not accrue unless the donee *dies without posterity*, and depends upon this  
 contingency.

**ROUANET**  
**vs.** So the interpretation of the 904th article of the La. Code given in the case of Pre-  
**HUNT, TUTOR,** jean's heirs *vs. Le Blanc* (3 La. Rep., 19) is *overruled*, and ceases to be con-  
**&c.** sidered a proper and correct interpretation.

The plaintiff alleges that on the 20th October, 1836, he made a donation to his daughter, Eugenie Rouanet, late wife of the defendant, by authentic act, a negro girl, then about 12 years old: that in July, 1840, his said daughter died leaving two children, issue of her marriage with the defendant; who is their tutor. He alleges that he is entitled to inherit and take said slave back to the exclusion of all other persons; but that the defendant refuses to deliver her up; whereupon he prays judgment that she be delivered to him and decreed to be his property.

The defendant pleaded a general denial; that the donation of the slave in question to the deceased, Eugenie Rouanet, was pure, unconditional and irrevocable, to her and her heirs and assigns forever; and that her minor children were born previous to making the donation, and that the plaintiff does not inherit the slave as he sets forth. He prays that his two minor children be declared the true owners of said slave and quieted in the possession thereof.

The cause was submitted on these pleadings and issues to the court, without any further evidence except the act of donation.

There was judgment decreeing the two minor children to be the true and lawful owners of these slaves, and the plaintiffs appealed.

*Thibodeaux & Boucherville*, for the plaintiff and appellant, relied on the 904th article of the Louisiana Code, and the decision in the case of *Prejean's heirs vs. Le Blanc*, 3 La. Rep., 19; also 1 Toullier, Nos. 226 to 240.

*M. Allister*, for the defendant.

EASTERN DIS.  
March, 1841.

*Simon, J.* delivered the opinion of the court.

ROUANET  
VS.  
HUNT, TUTOR,  
&c.

This case presents a question which, though not exactly similar to the one which was submitted to this court in the case of *Prejean's heirs vs. Le Blanc*, 3 La. Rep., 19, arises also on the 904th article of our Code, which is in these words: "*Ascendants, to the exclusion of all others, inherit the real estate and slaves given by them to their children or their descendants of a more remote degree, when these objects are found in the succession;*" and we are called upon by the plaintiff to allow him to retake and recover from the estate of his daughter, a certain female slave which he had formerly given to her by an act of donation *inter vivos*; and which, he contends, he is entitled to inherit to the exclusion of the children of the donee.

The act of donation states that the donor makes a donation *inter vivos* and irrevocably to Eugenie Rouanet, his daughter, and the wife of Newcomb Hunt, of a negro girl, &c., &c., to have and to hold the said negro girl unto the said *Eugenie, her heirs and assigns forever*. The facts of this case are undisputed; and although the expressions used in the act of donation may perhaps be considered as extending its effect further than exclusively in favor of the donee, yet we feel disposed to base the solution of this question principally and definitively on the interpretation, which, in our opinion, ought to be given to the 904th article of our Code, in connection with all the other articles relative to the same subject.

It is well known that after the decision of the case of *Prejean's heirs vs. Le Blanc*, the judge who had delivered the opinion of the court, examined the engrossed copy of the amendments to the Civil Code in the Secretary of State's office; and that he found the 904th article to be the same in both languages, but that the English text of the law had not been promulgated, as it was enacted. This English text of the law, as



**EASTERN DIS.** it is engrossed, is a correct and literal translation of the French ;  
March, 1841.

**BOUANET**  
**vs.**  
**HUNT, TUTOR,**  
**&c.**

and yet the article, as it was promulgated, contains a material discrepancy in the omission of the words: "*who die without posterity.*" So that the law, as it was published, cannot be taken as being the whole law in its entire and perfect context as it was enacted by the legislature; still, on the one hand, this law, as it stands in the Code, being clear and unambiguous, the French text ought to be disregarded, and on the other hand, our being aware that the part of the law which was promulgated does not express the full extent of the intention of the legislature, must necessarily keep us from giving again to the article in question the same interpretation and effect as were given to it by this court in the case of Prejean's heirs, that is to say: from extending its application in this case to excluding the children of the donee from the right of inheriting the property given to their mother.

All statutes or laws *in pari materia* ought to be construed together in order to ascertain the meaning of the legislator.

This is an instance, in which, if we were to give effect to the law according to its literal import, because it is expressed in clear and unambiguous terms, our interpretation would undoubtedly be in direct opposition to the true will and intention of the legislature. In this emergency, our safest and best course, must be to resort to the incontrovertible principle, that all statutes, *in pari materia*, ought to be construed together in order to ascertain the meaning of the legislator. *La. Code, art. 17; 1 Kent's Commentaries, 435; 7 La. Rep., 162.*

If so, on referring to article 905, we find that, "*Ascendants have also the right to take from the succession of their child or descendants WHO DIE WITHOUT ISSUE, the dowry they may have settled in money upon him;*" and the article 906 informs us that, "*ascendants inheriting the things mentioned IN THE PRECEDING ARTICLES, which they have given their children or descendants WHO DIE WITHOUT ISSUE, take them subject to all the mortgages which the donee may have imposed on them during his life.*" Is it not clear from this last article, connected with

the preceding ones (904 and 905), that the legislature had in contemplation when they adopted and passed the three successive provisions, cases of ascendants inheriting the objects by them given to their children or descendants *who die without issue*, and that the article 906 was worded according and in reference

to the right as allowed by the said articles 904 and 905? Was it not the intention of the law makers to provide that whenever the right of reversion should be exercised by ascendants according to the preceding articles, they should take the property subject to all the mortgages which the donee, *who dies without issue*, may have imposed upon them? Would it not be idle and absurd to contend that the expressions "*who die without issue*," have accidentally been inserted in the articles 905 and 906, and that they ought not to have any meaning? We cannot hesitate to answer these questions affirmatively; and if it be a true principle of law that we ought to construe the three articles together, in order to arrive at a fair and correct interpretation of the legislative will, we must necessarily infer from the provisions therein contained, which are all relative to the same subject, that ascendants are entitled to inherit, to the exclusion of all others, the real property and slaves which they have given to their children or their descendants "*who die without issue*"; that is to say: that this right of inheritance, or more properly called right of return or reversion allowed by law in favor of the donor, should not accrue, unless the donee should die without posterity.

In support of this interpretation, it will perhaps be proper to refer also to the art. 1521, which provides that: "*the donor may stipulate the RIGHT OF RETURN of the objects given, either in case of his surviving the donee alone, or in case of his surviving the donee and his descendants;*" and to the art. 1728, which says that, "donations in favor of marriage are presumed to be made for the benefit of the children or descendants to proceed from that marriage." Now it seems to us that the former article would have no object, if, according to

EASTERN DIS.  
March, 1841.

BOUANET  
vs.  
HUNT, TUTOR,  
&c.

The article 904 and two following of the La. Code, in both languages, when construed together and interpreted according to the spirit and intention of the legislature, provide only that ascendants or donors, are entitled to inherit to the exclusion of all others the real property and slaves given by them to their children or their descendants, *who die without issue*, when these objects are found in the succession.

The right to inherit, or right of return or reversion, allowed by law to the donor does not accrue unless the donee dies without posterity, and depends upon this contingency.

EASTERN DIS.  
March, 1841.

ROUANET

vs.

HUNT, TUTOR,  
&c.

So the interpretation of the 904th article of the La. Code given in the case of Prejean's heirs *vs.* Le Blanc (3 La. Rep. 19) is overruled, and ceases to be considered a proper and correct interpretation.

the decision in the case of Prejean's heirs, the property was to revert back to the donor immediately after the death of the donee, with or without issue; there would be no necessity to stipulate the right of return of the objects given, as the donor, if an ascendant, would always be sure to obtain it in case of his surviving the donee; and the provisions of the latter article establishing a general principle, in cases of certain donations, which are generally made by ascendants, would certainly have no meaning or would be in direct opposition to the article 904, under consideration; as in the one the surviving ascendant is allowed to retake the property by him given, to the exclusion and prejudice of the children or descendants of the donee; whilst in the other, it is positively declared that in case of survivorship of the donor, the donation is always presumed to be made for the benefit of the children or descendants of the party in whose favor such donation was made. This discrepancy must disappear from our laws.

We conclude, therefore, that the case of Prejean's heirs *vs.* Le Blanc must cease to be considered as a proper and correct interpretation of the 904th article of the Louisiana Code, and that the judge *a quo* did not err in rejecting the plaintiff's demand.

It is accordingly ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

## CONWAY vs. JONES ET AL.

EASTERN DIS.  
March, 1841.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

CONWAY  
vs.  
JONES ET AL.

A return by the sheriff, "that he seized in the hands of W. B. all the rights, credits, &c., and property of every kind which he might have in his possession or under his control, belonging to the defendant, sufficient to satisfy the writ of *fi. fa.*, of which seizure nothing came into his hands; *no other property found*," is insufficient to authorize the issuing of a *capias ad satisfaciendum*.

It is also required, before a *capias* issues, that demand shall be made by the sheriff of the parties, first of the defendant, and then of the judgment creditor, to point out property, *and all in vain*.

To enable the judgment creditor to proceed against the surety in a bail-bond or against bail, the sheriff's return on the *feri facias* must state that he has found no property to seize, notwithstanding the demand made of the parties.

This is an action against defendant, Jones, on his promissory note. He being arrested in New-Orleans gave William Brand as his bail. Judgment was rendered against him for the amount of the note. Upon this judgment a writ of *feri facias* was issued, on which the sheriff made the following return.

"Received January 9th, 1840, and seized in the hands of William Brand, the goods and chattels, lands and tenements, monies, effects or property of any kind which he might have in his possession, or under his control, belonging to the defendant, to an amount sufficient to satisfy the writ; of which seizure nothing has come into the hands of the sheriff; *no other property found*."

On the 11th January, interrogatories were propounded to Brand and he was cited to answer them, touching said property, &c., purporting to be seized in his hands, but they were never answered. After the expiration of the return day, of the *feri facias*, the plaintiff took out a *capias ad satisfaciendum* against the defendant, which was returned "*not found*."

A rule was then taken on William Brand, surety in the bail bond, to show cause why he should not pay the amount of said judgment against the defendant, interest and all costs.

The rule was made absolute, and Brand appealed.

EASTERN DIS. *W. S. Upton*, for the plaintiff, submitted the case on a written argument, urging the affirmance of the judgment.  
March, 1841.

CONWAY  
VS.  
JONES ET AL

*S. L. Johnson*, for the defendant and appellant, made the following points.

1. The grounds of the rule taken by plaintiff and appellee, (p. 14 of the record,) on the appellant are insufficient to hold him liable as bail.

2. The judgment of the court below, on said rule (p. 15 of the record), is based on the consideration of the plaintiff's "having established the grounds of his rule," and said grounds being insufficient, said judgment is necessarily erroneous.

3. Nor is the defect in the grounds of the rule and the judgment based thereon, caused by the testimony offered in support thereof.

The return on the *fi. fa.* was not such as the law requires to justify the issuing of a *ca. sa.*, (see p. 19, record, for return of *fi. fa.*), not showing any demand from the parties as required by Code of Practice, article 727.

4. The whole proceedings are defective, and the judgment of the court below is unsupported by law or evidence, and ought to be annulled and judgment given for this appellant, with costs in both courts.

*Morphy, J.*, delivered the opinion of the Court.

William Brand is sought to be made liable on a bail bond, which he had executed as surety of defendant. His main defence is that the return of the sheriff on the *fieri facias* issued in this case, was not such as the law requires and did not authorize the issuing of a *capias ad satisfaciendum*.

The return is in the following words, to wit: "Received January 9th, 1840, and seized in the hands of William Brand, the goods and chattels, lands and tenements, monies, effects and property of any kind which he might have in his possession or under his control belonging to the defendant, to an

amount sufficient to satisfy this suit, of which seizure nothing came into the hands of the sheriff; no other property found." EASTERN DIS.  
March, 1841.

The record shows that four days after this writ had issued, the counsel for the plaintiff on a suggestion to the court, that his client had reason to believe that W. Brand had property or money in his possession belonging to the defendant, moved for and obtained an order citing Brand, to answer interrogatories touching said property or money. No answers appear to have been made to these interrogatories, nor do we find any further proceedings in relation to them on the part of the plaintiff.

CONWAY  
VS.  
JONES ET AL.

This return does by no means show that the sheriff could find no property to seize. It states on the contrary that a seizure of property was made, but of which nothing come into his hands. Of what that property consisted, or why nothing came into the hands of the sheriff, we are uninformed; but, that something was found and seized, would seem to result from the last words of the return; "*no other property found.*" When rights and credits are seized; if they are not sold and money made out of them, nothing goes into the hands of the sheriff, and he might make the above return. There is nothing then which shows that no property was found to be seized. Before taking out a ca. sa. the plaintiff should have accounted for the property seized, whatever it was. Under an *alias fi. fa.* it might have been disposed of and the judgment satisfied out of its proceeds. At all events, the proceeding begun under the 13th section of the act of 1839, amending the Code of Practice, should have been followed up. The answers of the

A return by the sheriff, "that he seized in the hands of W. B., all the rights, credits, &c., and property of every kind which he might have in his possession or under his control, belonging to the defendant, sufficient to satisfy the writ of *fi. fa.*, of which seizure nothing came into his hands; *no other property found.*" is insufficient to authorize the issuing of a *capias ad satisfaciendum*.

It is also required, before a *capias* issues, that demand shall be made by the sheriff of the parties, first of the defendant, and then of the judgment creditor, to point out property, and all in vain.



**EASTERN DIS.** of the parties. When by his own exertions the sheriff cannot  
March, 1841. find effects to satisfy an execution, he must under the law call

**CONWAY**  
*vs.*  
**JONES ET AL.**

on defendant to point out property; if none is shown, applica-  
tion must be made to the judgment creditor. It is only after  
these steps have proved ineffectual that the sheriff is authorized

To enable the judgment creditor to proceed against the surety in a bail bond or against bail, the sheriff's return on the *fiery facias* must state that he has found no property to seize, notwithstanding the demand made of the parties.

to report that he has found no property to seize; C. Pr., art. 726-7. This court has held, (4 La. Rep., 301,) that to enable a plaintiff to proceed against a surety on an appeal bond, the sheriff's return must state that "he has found no property to seize notwithstanding the demand made of the parties." We cannot see why less should be required in a suit on a bail bond. It is said that this requisition is conditional; that the demand is to be made only in case no property is found by the sheriff to be seized. The argument places the counsel in this dilemma; if property was seized, no ca. sa. could issue until it was sold to satisfy the judgment; if no property was found to be seized, then according to the articles above quoted, a demand should have been made of the parties.

It might be urged that in this case no demand could be made of defendant because he left the State immediately after the service of the citation. Admitting this excuse to be good, although a demand could have been made of the *curator ad hoc* appointed to represent him, it only rendered the more necessary the demand required to be made of the judgment creditor; and the sheriff's return should have shown either a demand of the parties, or some impossibility; such as their absence, to prevent his making a demand. In cases like the present the law should be strictly pursued; and a surety cannot be called upon to pay, if any of the steps provided for the seizure of the principal's property have been omitted.

It is therefore ordered that the judgment of the District Court be reversed, and that there be judgment for the defendant in the rule, as in case of non-suit, with costs in both courts.

KINNEY *vs* CRANE.EASTERN DIS.  
March, 1841.

## APPEAL FROM THE COURT OF THE FIRST DISTRICT:

KINNEY  
*vs.*  
CRANE.

An agent who sells goods or property of his principal and takes a note to his own order, which is protested at maturity, and he uses no legal means, or proper diligence to enforce or secure payment, he makes the debt his own, and is liable to his principal for its amount.

This is a suit by the plaintiff against his agent employed in the sale of coaches, carriages, &c. An account is duly made out charging the agent with the items and amount of the property sold, and also crediting him with sundry items for charges paid and monies accounted for, &c. There is one disputed item. The defendant tenders to his principal a note for \$475, given by Dr. J. M. Mackie for the price of a gig, which the defendant avers he sold and delivered, as he would his own property; supposing he was acting for the best interest of the plaintiff, and is not responsible himself for the payment of said note. He denies that he was guilty of any negligence or want of diligence in endeavoring to collect it; and tenders the note, and says it is in full of any balance otherwise standing against him.

The case was submitted on the issue of the liability of the defendant to pay the amount of Dr. Mackie's note; he having failed to enforce the claim against the Doctor after the maturity of the note, and while the gig was still in his possession. The note was due the 1st January, 1836; and the plaintiff's account and demand for settlement and payment with the defendant was rendered the 1st January, 1838.

There was a small balance claimed for commissions which was contested. The District Judge disallowed them; and decided that the defendant acted negligently in his agency, by not using all legal exertions to secure payment for the price of the gig, when he might have seized it in the hands of the vendee, after the note was over due and unpaid.

EASTERN DIS.  
March, 1841.

There was judgment against the defendant, and he appealed.

KINNEY  
vs.  
CRANE.

*G. B. Duncan*, for the plaintiff.

*Preston*, contra.

*Morphy, J.* delivered the opinion of the court.

An agent who sells goods or property of his principal, and takes a note to his own order, which is protested at maturity, and uses no legal means or proper diligence to enforce or secure payment, he makes the debt his own, and is liable to his principal for its amount.

This is a suit on an open account. The only item about which there is any dispute is a charge made against the defendant for the price of a gig sold by him to one Dr. Mackie for account of the plaintiff, a coach-maker, residing in the city of Newark, New Jersey. The sale was made on the 28th of July, 1835, at a credit of six months, and defendant received Mackie's note to his own order, which when due was protested for non-payment. It appears that although the gig remained in the vendee's possession after the maturity of the note, the defendant failed to enforce on it his lien as vendor; and has since used no legal exertions whatever to secure the payment of the price for his principal. Admitting that at the time of the sale he was justified under the evidence, in selling to Mackie without requiring an endorser, we fully concur in opinion with the inferior court that the defendant by thus keeping the note for years in his possession without using common diligence to collect it, has made the debt his own and was properly charged with its amount; La. Code, art. 2972; Story on Agency, p. 189.

The judgment of the District Court is therefore affirmed with costs.

ARROWSMITH *vs.* MAYOR ET AL.EASTERN Dis.  
March, 1841.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW ORLEANS.

ARROWSMITH  
*vs.*  
MAYOR, ET AL.

In an action on a contract and on a *tort*, against several defendants, they will be allowed to sever in their defence; even co-trespassers may plead and be tried separately; *a fortiori* when one defendant is sued on a contract and the other on a *tort*.

The plaintiff alleges that in March, 1835, he contracted with the corporation of New Orleans to build a rail road from St. Claude street to the Bayou St. John, with branches, from which he was to derive extensive privileges, immunities and advantages. That he entered into extensive engagements, to commence the construction of said road, and made every necessary arrangement on his part, in compliance with an ordinance passed on the subject; that by the arrangements made and capital invested, he could and would have finished said road before the middle of July, 1835, had he not been retarded by the neglect and refusal of J. Pilié, Esq., City Surveyor, to give him lines and the level of said road, as he was bound to do by the said city ordinance. That he has made repeated applications and demands on the Mayor and City Surveyor to have said lines and levels run and made; but said Pilié, although repeatedly instructed and directed to perform his duty, has entirely neglected and refused; in consequence of which he has been stopped in his operations and prevented from completing said road and reaping the benefits and revenues, which it would have yielded since the 15th July, 1835, to his great damage, \$24,000 and upwards, without taking into consideration loss of credit, trouble and vexation he has experienced, as will more particularly appear from a statement which he annexes. He alleges that both the corporation and J. Pilié, the agent, are liable in damages for the amount of his losses for their failure to perform their duties, and comply on their parts with the contract entered into with him and the ordinance of the City Council made on the subject. He prays judgment *in solido* against the Mayor, Aldermen and inhabitants of New Orleans,

EASTERN Dis. and against Joseph Pilié for the amount of his damages as  
March, 1841. above stated.

ARROWSMITH  
vs. The defendants severed in their answers, and each pleaded  
MAYOR, ET AL. the general issue.

When the cause was called for trial, the defendants applied to the court to be tried separately; which was opposed by the plaintiff's counsel, but was permitted by the court. The plaintiff's counsel excepted, and finally took a judgment of non-suit and appealed.

*Roselius*, for the plaintiff, contended that the defendants being sued *in solido*, had no right to sever in the trial. The case must be tried against all the parties at the same time; there is manifest error in the decision of the judge in permitting a severance on the trial, which should be corrected. The liability of the parties defendant, arises from the same cause and under the same contract, and they must be tried together.

*Canon*, contra.

*Martin, J.* delivered the opinion of the court.

The plaintiff seeks damages from the Corporation of New Orleans, on a contract for the construction of a rail road; and from J. Pilié, the other defendant, City Surveyor, for his neglect and refusal to furnish him with the level and lines necessary to the construction of this road. Damages are claimed *in solido*. The defendants filed separate answers and insisted on separate trials. This being objected to by the plaintiff, and the pretensions of the defendants being sustained by the court, the former took a non-suit; but the parties have entered into an agreement of record as follows:

"That whereas in this case a judgment of non-suit has been submitted to by the plaintiff in order to enable the parties to try the question of *the right of severance* by the defendants in the Supreme Court: should the decision on

that point be sustained, the plaintiff should have the right to re-instate his suit on the present pleadings: either party may amend."

It appears to us the Parish Court did not err. One of the defendants was sued on a contract; and the other on a *tort*. They pleaded severally; and had the right to do so. In the case of *Sere vs. Armitage*, 9 Martin, 394, this court held, that "if there be several defendants in an action of trespass and they plead separately, they may have the cause tried separately; but if they go to trial *jointly*, and suffer a verdict to be given against them, they cannot afterwards object to it as error." There is an infinitely greater connection between trespassers who are sued for the same trespass, than that between the present defendants; one of whom is sued on a contract and the other on a *tort*.

EASTERN DIS.  
March, 1841.

BARATARIA  
AND LAFOURCHE  
CANAL CO.  
VS.  
FIELD ET AL.

In an action on a contract, and on a *tort*, against several defendants, they will be allowed to sever in their defence; even co-trespassers may plead and be tried separately; *a fortiori*, when one defendant is sued on a contract and the other on a *tort*.

It is therefore adjudged and decreed that the judgment of the Parish Court be annulled, avoided and reversed; and that the cause be remanded for further proceedings according to the agreement of the parties: the plaintiff and appellant paying the costs of this appeal.

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**BARATARIA & LAFOURCHE CANAL CO., vs. FIELD ET AL.**

APPEAL FROM THE COURT OF THE SECOND DISTRICT, FOR THE PARISH OF LAFOURCHE, THE JUDGE THEREOF PRESIDING.

In an action for damages to plaintiff's works and land, parol evidence is admissible to prove possession and acts of ownership of the premises. The judge is not required to sign a bill of exceptions which does not embrace the true grounds of his opinion. A party taking a bill of exceptions must spread on its face every thing necessary to bring the point in its true light before the appellate court.



**EASTERN DIS.** Evidence is admissible which is pertinent to the issue; going to show the extent  
*March, 1841.* of the injury complained of, and the cause from which it proceeds.

**BARATARIA** A witness cannot be interrogated respecting the ownership of a tract of land,  
**AND LAFOURCHE** when an examination of the written title would show it.

**CANAL CO.** The declarations of defendant's husband, separated in property, but acting as her  
**VS.** agent, made in relation to the management of her levee's, is admissible, as  
**FIELD ET AL.** evidence against her.

It is not necessary to show police regulation, to compel a front proprietor to make his levees on a bayou, which communicates with the river. Under the law of 1829, all riparian proprietors are bound to make and keep up levees on their fronts; and in neglecting to do so, are liable for all damages and losses, agreeably to articles 2294—5 of the Louisiana Code.

This is an action in which the plaintiff claims \$15,000 in damages from the defendant, Mrs. Field, owning about 40 arpents front of land, on the Bayou Lafourche, which she neglected to have leveed; and the police jury also, in consequence of which the plaintiff's canal then digging through was overflowed, the company's hands became sick and the work of excavation was greatly retarded. The plaintiffs show that they were working on their own land, adjacent, which was overflowed from defendants. They pray judgment against the defendant, Mrs. Field; and the police jury, severally and *in solido*, for the amount of his damages; occasioned by failing to make a levee across the front of the land owned by defendant, which was overflowed. The defendants separated in their defences. Mrs. Field pleaded the general issue: She denies that the plaintiff suffered damage from any act or omission of hers; but avers that she has suffered great wrong and damage from the operations of the company in obstructing the natural drains of her plantation by the embankments of their canal. That they have totally ruined her crop, which by the loss of labor to save it, she has suffered damages to the amount of \$10,000; for which she prays judgment in re-convention.

The police jury pleaded a general denial.

Upon these pleadings and issues, the cause was submitted to the court and a jury.

There was a mass of testimony produced. Several bills of

exception were raised in the course of the trial to the admission and rejection of evidence and to the charge of the judge to the jury, which are particularly noticed and examined in the opinion of this court.

EASTERN DIS:  
March, 1841.

BARATARIA  
AND LAFOURCHE  
CANAL CO.

VS.  
FIELD ET AL.

The jury returned a verdict in favor of the police jury; and for the plaintiffs against the defendant, Mrs. Field in the sum of \$1200; after an unsuccessful effort to obtain a new trial, from judgment confirming the verdict the defendant appealed.

*S. L. Johnson*, for the plaintiffs.

*Beatty*, for the defendant and appellant.

*Simon, J.* delivered the opinion of the court.

This is a suit for damages. Plaintiffs allege that in the spring of the year 1840, they had nearly completed their work on the Baratarian and Lafourche Canal, and were engaged in excavating the said canal, through a piece of land belonging to them, measuring five arpents front on the left bank of the bayou Lafourche by forty arpents in depth, bounded on each side by lands belonging to the defendant, Eliza Mills, wife of William Field (separated in property from her husband); that they had employed in the said work about sixty slaves and two dredging machines; when their said land was overflowed, and the further excavation of said canal was thereby interrupted; that the labor of most of said slaves was lost to them, their expenses increased by sickness of their slaves caused by the overflow, and the completion of the said canal greatly retarded; by all which in injuries and particularly by that arising from the delay in the opening of the said canal, all occasioned by the said overflow, they have sustained damages to the amount of \$15,000. They further represent that the said inundation and damages were owing to the want of good and sufficient levees on the property of the defendant, Mrs. Field, lying on each side of their land, and to the neglect and omission of the said defendant to

**EASTERN DIS.** make and maintain such levees thereupon as by law she was  
**March, 1841.** required to make on her said property; that said neglect was  
**BARATARIA** gross, culpable and intentional on the part of the defendant,  
**AND LAFOURCHE** who is responsible for the damage caused thereby. They also  
**CANAL CO.** state that in default of the said defendant, the police jury of  
**VS.** the parish of Lafourche interior was bound to cause said levees  
**FIELD ET AL.** to be made and maintained in good faith, &c., &c.; and that  
the said police jury, is therefore jointly and severally indebted  
to them in the said amount of damages, &c., &c.; they pray  
for judgment against the defendant, Mrs. Field, and the police  
jury *in solido*, for the sum of \$15,000. The defendant, Mrs.  
Field, pleaded the general issue, and further averred, that she  
had suffered damages from the operations of the plaintiffs who  
have obstructed the material drains of her plantation by the  
embankments of their canal; that her crop was totally ruined;  
by the loss of which she has suffered damages to the amount  
of \$10,000 which she pleads in reconvention against plaintiffs'  
demand. The police jury, also pleaded the general issue; the  
case was regularly tried by a jury who found a verdict in favor  
of the police jury and against the defendant, Mrs. Field, for  
\$1200; and after an unsuccessful attempt to obtain a new trial,  
the defendant, Field, took the present appeal.

Our first inquiries must be in relation to numerous bills of  
exceptions taken by the defendant to the opinion of the court  
on divers questions of evidence, and also to the legality of the  
charge of the court to the jury.

1. The record shows us that the court, *a quo*, having decided  
In an action for damages to that the plaintiffs had a right to show possession and acts of  
plaintiffs works and land, parol ownership by parol testimony, defendant's counsel took and  
evidence is ad- missible to tendered a bill of exceptions, in which it was simply stated that  
prove posses- sion and acts of the plaintiffs had offered to prove ownership by parol; which  
ownership of bill the court refused to sign, unless it embraced the reasons  
the premises. on which it was grounded, and suggested to the counsel the  
propriety of embodying all the testimony objected to and admit-  
ted by the court in the bill of exceptions; which was declined.

We are of opinion that the district judge did not err in permitting parol evidence to be introduced to prove a possession and acts of ownership; and we think also that he acted correctly in refusing to sign a bill of exceptions which did not embrace the true grounds of his opinion. This court has often decided that a party who takes a bill of exceptions, must spread on its face, every thing necessary to bring the point in its true light before the appellate court, 8 *N. S.*, 389. 11 *La. Rep.*, 309. 12 *La. Rep.*, 266. The most reasonable and proper mode was undoubtedly to embody the testimony admitted by the court in the bill of exceptions, as this would have enabled us to decide whether the court below erred or not; but this having been declined by defendant's counsel, we must consider the evidence as if no exception had been taken to its admissibility.

2. The next bill of exceptions is one taken to the opinion of the court, permitting the plaintiffs to prove that many of the inhabitants had been obliged to quit their houses in consequence of the overflow resulting from the crevasses on the land of the defendant: We think the district judge did not err: the object of the evidence was certainly pertinent to the issue, as it went to show the extent of the inundation and the cause from which it proceeded.

3. Defendant's counsel having proposed to ask a witness, the following questions: "did you or not as inspector of the upper part of the fifth ward of the parish, apply to judge Knobloch as register of conveyances to know to whom a tract of unoccupied and uncultivated land in your ward on the left bank of the bayou belonged, and were you not answered that it belonged to Varice Coulon?" and other questions to the same purport with regard to other tracts; the district judge refused to permit the interrogatories to be propounded, and said defendant took a bill of exceptions. We think the judge did not err; as the evidence sought to be introduced was not only harrassing; but went to show title by parol and reputation. The best evidence to prove the facts alluded to, was the

EASTERN DIS.  
March, 1841.

BARATARIA  
AND LAFOURCHE  
CANAL CO.  
VS.

FIELD ET AL.

The judge is not required to sign a bill of exceptions which does not embrace the true grounds of his opinion. A party taking a bill of exceptions must spread on its face every thing necessary to bring the point in its true light before the appellate court.

Evidence is admissible which is pertinent to the issue: going to show the extent of the injury complained of, and the cause from which it proceeds.

A witness cannot be interrogated respecting the ownership of a tract of land, when an examination of the written title would show it.

**EASTERN DIS.** production of certified copies of the acts said to exist in the  
**March, 1841.** office of the register of conveyances.

**BARATARIA  
 AND LAFOURCHE  
 CANAL CO.  
 vs.  
 FIELD ET AL.**

The declarations of defendant's husband, separated in property, but acting as her agent, made in relation to the management of her levee's, is admissible, as evidence against her.

4. The district judge decided correctly in permitting the plaintiffs to prove that what defendant's husband had said in relation to her levees. It had been clearly shown that he was and acted as the general agent of his wife and transacted all her business; and his acts and conduct in the administration of the affairs of the defendant, were good evidence against her, particularly to rebut her reconventional demand.

5. The evidence offered from a suit between William Field in his own name and F. Girod, is in no manner connected with his declarations referred to in the 4th bill of exceptions; and was properly rejected by the court; the record of said suit was *res inter alios acta*.

6. The situation of the plaintiff's levees on the opposite side of the bayou Lafourche, has nothing to do with that controversy, and cannot be made the subject of an investigation in this suit.

7. The last bill of exceptions, is one taken by the defendant to the judge's charging the jury that "it was not necessary to show a police regulation to compel a front proprietor to make his levees on the bayou which communicates with the river," and referring them to the act of the legislature, respecting roads and levees, of 1829. This law of 1829, provides that the levees shall be made by the riparian proprietors in the proportions and at the time prescribed by the act; it fixes the height and base of the levees, gives the distance from the river; leaves the said distance on the bayou to the determination of the police jury; authorizes the police juries to appoint inspectors; provides in its 25th section "that every proprietor whose levee shall have been broken by *his own neglect* to comply with the provisions of this act, shall be liable towards the planters who shall suffer by it, for all damages and losses, agreeably to articles 2294 and 2295 of the Civil Code, under the head of offences and quasi-offences;" and appears to be a general law passed for the purpose of establishing certain uniform rules and regulations in relation to

It is not necessary to show police regulation, to compel a front proprietor to make his levees on a bayou, which communicates with the river. Under the law of 1829, all riparian proprietors are bound to make and keep up levees on their fronts; and in neglecting to do so, are liable for all damages and losses agreeably to articles 2294—5 of the Louisiana Code.

the levees which are to be made on the river Mississippi or bayous running to or from the same, under this law, there was certainly no necessity for any police regulation to compel front proprietors to make their levees, as the law itself makes it the duty of every riparian proprietor make his said levees, and renders him responsible in damages to any one who may suffer from his neglect. The charge was, in our opinion, correct; and under it, by referring to the law of 1829, the jury were fairly enabled to apply the evidence to the respective pretensions of the parties.

EASTERN DIS.  
March, 1841.

BARATARIA  
AND LAFOURCHE  
CANAL CO.  
VS:  
FIELD ET AL.

On the merits of the case, we have carefully perused and examined the voluminous record which contains the testimony of the numerous witnesses heard on both sides. Some parts of the evidence appear contradictory; several of the witnesses say: that the complaint was universal about Mrs. Field's levees; that it was useless for others to make levees whilst these were neglected; one of them swears that he traversed the whole extent and counted thirty-nine *crevasses* on the defendant's land, and agrees with other witnesses that the inundation must be attributed to the fault of Mrs. Field; plaintiff's witnesses generally concur in saying that there had been gross negligence respecting defendant's levees, as the crevasses on her land below the company's tract were of four years standing and had never been stopped; that those crevasses were sufficient to have overflowed the whole country; that as to negligence, there had never been any thing else, and that for a long time, nothing had been done to the levees. On the other hand, defendant attempted to show that there were crevasses on other tracts which might have been the cause of the inundation; on this subject, the evidence, though contradictory, appears to weigh very particularly on the side of the plaintiffs' who, from the situation of the tract of land on which they were excavating their canal, as shown by the plan produced in evidence, must have suffered considerably from the crevasses on defendant's land, and from her neglect in making the necessary repairs to



**EASTERN DIS.** her levees. On the whole, when we consider that the jury  
**March, 1841.** who tried this cause was composed of inhabitants of the parish  
**WINCHESTER** where the inundation complained of took place ; that they were  
**vs.** all undoubtedly well acquainted with the situation of the dif-  
**ORY'S SYNDICS** ferent tracts subject to be overflowed ; that they heard the wit-  
 nesses who testified before them, and were the proper judges of  
 the degree of credibility to be placed in their testimony ;—  
 when we consider also that the judge of the district presided in  
 the cause, and that after having gone through the minute pro-  
 ceedings of a long and tedious trial, in which he had repeated  
 opportunities of observing the department and conduct of  
 witnesses, with whom he was perhaps not unacquainted, and  
 that he refused to set aside the verdict of the jury, we cannot  
 refrain from expressing our deliberate opinion that such a  
 verdict, which so far from being manifestly erroneous, ought  
 not to be disturbed.

It is, therefore, ordered, adjudged and decreed, that the judg-  
 ment of the district court, be affirmed, with costs.

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**WINCHESTER vs. ORY'S SYNDICS.**

APPEAL FROM THE COURT OF THE SECOND DISTRICT, FOR THE PARISH OF ST. JAMES,

THE JUDGE THEREOF PRESIDING.

A subsequent transfer of notes with *notice and delivery*, will hold against a prior  
 pledge and transfer by notarial act, *without actual delivery*, although due notice  
 had been given.

The pledge of a claim or note on another person, must be by notarial act, with *actual delivery* of the thing pledged; and if it be a negotiable note must be endorsed. Without such transfer and delivery the rights of third parties are not affected.

EASTERN DIS.  
March, 1841.  
WINCHESTER  
VS.  
ORY'S SYNDICS.

This is an action in which the plaintiff seeks to recover a dividend of part of the proceeds of the estate of the ceding debtor, from the syndics, arising on several notes of the insolvent, held by plaintiff.

These notes were originally held by Michel Bergeron, who had endorsed for the insolvent and become liable in a large amount. Bergeron having transactions with one Prevost and Jules Balloc, transferred and pledged all his right to said notes by public act to Prevost; stating in the act that they were on file in the clerk's office, but promises therein to deliver them as soon as possible. Prevost, soon after, transferred all his right and interest in said act of pledge to the Widow Balloc, and notice thereof was given to the syndics of Ory, the original debtor, who had in the meantime made a cession of his property for the benefit of his creditors. This last transfer and notice took place in November, 1836. In the spring of 1838, Bergeron transferred to the plaintiff the very same notes by private act, which was shortly afterwards duly recorded, and notice of the transfer given to the syndics. The plaintiff as the attorney and transferree of the notes took them from the clerk's office, into his own possession.

Soon after these proceedings, a tableau was filed by the syndics, and a dividend of \$3958 was set apart on account of these notes. The question is, which one of the transferrees is entitled to the dividend? The District Judge gave it to the plaintiff. From judgment in his favor the syndics appealed.

*Miles Taylor*, for the plaintiff.

*Canon*, contra.

*Morphy, J.* delivered the opinion of the court.

EASTERN Dis.  
March, 1841.

WINCHESTER  
vs.  
ORY'S SYNDICS.

In 1833, Michel Bergeron paid, as endorser for J. B. Ory, notes to the amount of \$12,833; having subsequently borrowed \$5550 of one Maurice Prevost, Bergeron made out his promissory note for the amount to the order of and endorsed by Jules Balloc, payable in 1835, and as collateral security he executed in favor of Prevost a notarial act pledging and transferring to him the notes he held against Ory, who had failed in the meantime. These notes were not delivered to the pledgee, but it is mentioned in the act that they were on file in the District Court in and for the parish of St. James; and Bergeron promises to deliver up them as soon as possible. In 1835, Prevost transferred all his right under this act of pledge to the widow of Jules Balloc, and of this the defendants were notified in November, 1836. Some years after this, to wit: on the 2d of March, 1838, Bergeron, by a deed under private signature which was afterwards recorded, transferred and delivered these same notes to Winchester, and the transfer was notified to the syndics of Ory on the 6th of the same month. In April following, a tableau of distribution was filed by the latter, allotting to Bergeron \$3958 25 as a dividend on these notes, and on the 26th of May, they paid this amount to the attorney of Widow Balloc. This suit is brought to recover this dividend on the ground that it has been improperly paid by the syndics. There was judgment below for the plaintiff and defendants appealed.

The only question presented for decision is which of the two transferees of these notes was entitled to receive the dividend declared on them? It must surely be the one to whom the notes had been delivered. The circumstance that they were

A subsequent transfer of notes with notice and delivery, will hold against a prior pledge and transfer by notarial act, without actual delivery; although due notice had been given.

withdrawn from the clerk's office on a petition of Winchester, acting as attorney for Bergeron, has nothing in it which shows any unfairness on the part of the former. There is no evidence that he had any knowledge whatever of the previous pledge to Prevost; although he signed this petition as attorney for Bergeron, it was no doubt understood that he was to keep the

notes, which had been transferred to him but a few weeks before for a valuable consideration. This transfer having been notified to the syndics, vested in the plaintiff Bergeron's claim on them. The pledge executed to Prevost, whose rights under it were afterwards transferred to Widow Balloc, was defective. The Louisiana Code, article 3123, provides that when a debtor wishes to pawn a claim on another person, he must make a transfer of it in the act of pledge and deliver to the creditor the note or obligation which is the evidence of it and endorse it, if it be negotiable"; without therefore such *transfer and delivery* the rights of third parties cannot be affected. This delivery is required to guard against what has happened in this very case. The defendants, with notice of this subsequent transfer to plaintiff, should not have paid to Widow Balloc the dividend due on these notes without requiring their production. They must have known, as the testimony proves that they did know, that they could not safely pay to any one but the holder of the notes: moreover, the obligation of Bergeron, to secure which the pledge was executed, fell due in 1835; for aught that appears in this record it may have been paid by himself, for it is not produced nor is it shown by whom it has been paid.

It is therefore ordered that the judgment of the District Court be affirmed with costs.

EASTERN DIS.  
March, 1841.

WINCHESTER  
VS.  
ORY'S SYNDICS.

The pledge of a claim or note on another person, must be by notarial act, with actual delivery of the thing pledged; and if it be a negotiable note must be endorsed. Without such transfer and delivery the rights of third parties are not affected.

EASTERN DIS.  
March, 1841.

STATE *vs.* JUDGE OF PROBATE COURT OF NEW  
ORLEANS.

STATE  
VS.  
JUDGE OF PRO-  
BATE COURT  
OF N. ORLEANS.

APPLICATION FOR A MANDAMUS.

A suspensive appeal does not lie from a judgment removing a tutor, and appointing another in his place, as the minor would be without a protector during the pendency of the appeal.

This case comes up on the application of John L. Riddell, for a mandamus commanding the Judge of Probates to allow a suspensive appeal from his judgment removing the applicant from the office of tutor of the minor, Frederick Banks.

The applicant declares that the value of said office exceeds three hundred dollars, and alleges that he is entitled to a suspensive appeal from said judgment, and be allowed to continue in office in the meantime.

On a rule taken upon the judge to show cause why he should not allow the suspensive appeal, he answers that the minor would be without protection during the pendency of the appeal. That it is a judgment which must be provisionally executed, &c.

*Bartlette*, for the applicant.

*Martin, J.* delivered the opinion of the court.

In the matter of John L. Riddell, tutor to the minor, Frederick Banks, removed from said office by the Judge of Probates for the city and parish of New Orleans; the tutor took a rule on the judge to show cause why he should not grant a suspensive appeal from said order of removal. The judge showed for cause: 1. That the minor would be without a tutor during the pendency of the appeal; the tutor appointed not having yet given the security required. 2. The judgment rendered is one of those which are executed provisionally. 3. The judgment is preparatory to the appointment of a tutor and relative thereto.

The facts of this case, as we understand them from the argument are these: A tutor had been first appointed to the minor, and dispensed, by a family meeting, from giving security. On his leaving the State, the present applicant for the appeal was appointed, and contends, that as his predecessor was dispensed from giving security, he was also. On complaint, he was removed, and a third person appointed tutor to the minor. It is from the judgment thus removing him and appointing another, that he seeks and claims a suspensive appeal.

EASTERN DIS.  
March, 1841.

STATE  
vs.  
JUDGE OF THE  
COMMERCIAL  
COURT.

A suspensive appeal does not lie from a judgment removing a tutor and appointing another in his place, as the minor would be without a protector during the pendency of the appeal.

It appears to us clear, that the Judge of Probates properly refused it. Had he granted the appeal, the minor would have been without a legal protector during the pendency of the appeal. Against this, we have an express textual provision of law. The Code of Practice, 580, provides that some judgments are to be provisionally executed, notwithstanding and without prejudice to the right of appeal. Judgments relating to the appointment of tutors are among these. The rule is therefore discharged.

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**STATE vs. JUDGE OF THE COMMERCIAL COURT.**

**AN APPLICATION FOR A MANDAMUS.**

The sufficiency of the surety offered in a suspensive appeal, is left to the determination of the Judge *a quo*, and he ought to be good and solvent.

The party praying a suspensive appeal, must offer to the Judge *a quo* a good and sufficient surety within ten days; and if found insufficient the appeal is lost through the fault of the appellant, and the appellee may have his execution immediately.

This case comes up on an application for a mandamus to



EASTERN DIS. compel the Judge of the Commercial Court to allow a *suspensive* appeal in the case of *Garretson vs. his creditors.*  
March, 1841.

STATE  
 VS.  
 JUDGE OF THE  
 COMMERCIAL  
 COURT.

The facts alleged for the *Mandamus*, are, that on the filing of a tableau of distribution by the insolvent, who was his own syndic, N. Hoey made opposition and claimed to be a privileged creditor in the sum of \$1500 for rent due. His opposition was sustained by a judgment of the court, and the syndic prayed for a suspensive appeal. Hoey took a rule to set aside the appeal on the insufficiency of the security offered, which was sustained.

The syndic alleges that he offered additional and undoubted security, but the Judge refused to allow an appeal that is suspensive; wherefore, he prays that a *mandamus* issue commanding him to grant a suspensive appeal, as prayed for, on giving good security.

The Judge showed for cause, that the security offered on granting the appeal was proved to be insufficient, and that according to the case in 13 La. Rep., 574, the suspensive appeal was gone, and the appellee entitled to take out execution.

*Preston*, for the applicant, urged that a peremptory *mandamus* issue.

*Simon, J.* delivered the opinion of the court.

A rule having been taken upon the Judge of the Commercial Court to show cause why a *mandamus* should not issue, ordering him to allow a suspensive appeal in the case of *Garretson vs. his creditors*, said Judge made the following return:

"That H. Garretson, as syndic of his own creditors, the 29th of August, 1840, filed a provisional tableau of distribution; that an opposition thereto was filed by N. Hoey, a creditor, for rent to the amount of \$1500; claiming a privilege over all other creditors on the property in the store, which was leased to said Garretson."

"That on the 28th November, 1840, a judgment was given

reforming the tableau, and according to the opponent the privilege claimed by him; that on the 8th day of December, 1840, said Garretson filed a petition, praying a suspensive appeal and offering Harris Lyons as security; that on the 11th of December, N. Hoey took a rule to show cause why the appeal should not be set aside for the insufficiency of the security; and the appellant not justifying his security the order was made accordingly. This decision was made in accordance with the case of the State *vs.* Judge Buchanan; 13 La. Reports."

EASTERN DIS.  
March, 1841.  
STATE  
vs.  
JUDGE OF THE  
COMMERCIAL  
COURT.

The proceedings had before the Commercial Judge on the rule to show cause, alluded to in his return, have not been laid before us, and we are therefore totally ignorant of the course which has been pursued below; but supposing it to be in our power to determine on the sufficiency of the surety offered, which, according to the 573d article of the Code of Practice, is left to the determination of the judge *a quo*, and in the words of the article 575, ought to be *good and solvent*, we have not had any means of enquiring into the facts and of ascertaining the reasons which may have led the lower court to reject the security offered by the appellant.

The sufficiency of the surety offered in a suspensive appeal, is left to the determination of the Judge *a quo*, and he ought to be good and solvent.

Whatever proceedings may have been had below, on the trial of the opposition made by the appellee to the sufficiency of the surety named in the appeal bond, we must presume that the inferior judge acted correctly; and this case being exactly similar to the one referred to by the judge of the Commercial Court in his return, 13 La. Rep., 574; must be governed by the rule therein established, which is: that if the surety given be not good and solvent, the appeal must be set aside, and the appellee allowed to issue his execution.

The party praying a suspensive appeal, must offer to the Judge *a quo*, a good and sufficient surety within ten days; and if found insufficient the appeal is lost thro' the fault of the appellant, and the appellee may have his execution immediately.

The rule is therefore discharged.

EASTERN Dis.  
March, 1841.

JACKSON, RIDDLE & CO. *vs.* WARWICK.

JACKSON, RID-  
DLE & CO.

*vs.*  
WARWICK.

## APPEAL FROM THE COURT OF THE FIRST DISTRICT:

An attachment bond, for a sum exceeding by one half *that claimed*, must be, given, with one good and solvent surety, residing within the jurisdiction of the court, sufficient to answer *for the amount of the obligation*, before a writ of attachment can issue.

If it appears the surety is not worth the full amount of the attachment bond although he may be fully able to answer for *the amount of property actually attached*, the attachment will be set aside.

This is an attachment case. Mrs. Ellen Kirkman made affidavit that she was the agent of the commercial firm of Jackson, Riddle & Co. who reside in Philadelphia, and are absent from this state; that William Sydney Warwick late of London, but now temporarily in New-Orleans, is indebted to said firm in the sum of \$196,272; that said sum is now due, and the defendant, Warwick, resides out of the state of Louisiana.

On this affidavit, bond was given for \$300,000 by the plaintiff with Mrs. Ellen Kirkman and George A. Pynchon as sureties, and a writ of attachment issued accordingly.

Petition was filed, garnishees cited and the case put in a regular train of proceeding:

When the defendant took a rule on the plaintiffs to show cause why the attachment should not be set aside because of the insufficiency of the sureties for the amount of the attachment bond.

On the trial of the rule, Mrs. Ellen Kirkman the principal surety, gave in a schedule or statement of her property and effects amounting to \$297,000, without making any deduction for bad debts. The District Judge was however of opinion, as the security appeared ample for the amount of property seized, the attachment should be maintained, although the security was not sufficient to answer for the whole amount of

the bond. From judgment discharging the rule, the defendant appealed. EASTERN DIS.  
March, 1841.

*Anderson & Elwyn*, for the plaintiffs.

*Grymes & Briggs*, for the defendant.

JACKSON, RID-  
DLE & CO.,  
TS.  
WARWICK.

*Bullard J.* delivered the opinion of the court.

This is an appeal from a judgment of the District Court discharging a rule to show cause, why the attachment issued in the case should not be set aside on two grounds: 1st. That the plaintiffs had failed to furnish good and solvent security on the attachment bond filed in the cause as the law requires: 2d. That the person acting as agent has no good and sufficient authority as such.

The amount of the bond required by the order of the Judge, when directing the attachment to issue was three hundred thousand dollars; and it is denied that Mrs. Kirkman and George A. Pynchon, the sureties, are worth that amount, and consequently are not the good and solvent sureties required by our attachment laws. The court below considered that although the sureties were not strictly sufficient for the whole amount of the bond, yet as their suretyship was sufficient to cover the property actually attached which was only \$100,000, the attachment ought to be maintained to that extent—which was ordered accordingly, and the defendant appealed.

It has always been held by this court, that when resort is had to the extraordinary remedy by attachment, which commences by seizing the property of the debtor, all the pre-requisites of the law must be strictly complied with. The only inquiry therefore is, whether the bond in this case be such in amount and secured by solvent persons as the law requires. Code of Practice, article 245, requires of the creditor to annex to his petition his obligation in favor of the defendant for a sum exceeding by one half that which he claims, with the surety of one good and solvent person residing within the ju-  
An attach-  
ment bond, for  
a sum, exceed-  
ing by one half,  
that claimed,  
must be given,  
with one good  
and solvent  
surety, residing  
within the juris-  
diction of the  
court, sufficient  
to answer for  
the amount of  
the obligation,  
before a writ of  
attachment can  
issue.

EASTERN DIS.  
March, 1841.

JACKSON, RID-  
DLE & CO.,  
vs.  
WARWICK.

isdiction of the court. The standard by which the amount of the bond is to be measured is the amount of the debt sworn to, because it is to that amount the property of the debtor may be attached—a smaller bond can in no case be taken, and it is only on giving such a bond that the writ can legally issue. But to what amount must the surety be solvent? This question is answered by article 3011, of the Louisiana Code, which declares that a debtor obliged to furnish security must offer a person able to contract, of property sufficient *to answer for the amount of the obligation*, and whose domicil is in the jurisdiction of the court where it is to be given. By the obligation must be meant the principal obligation, and the liability of the surety must be co-extensive therewith. By the bond now in question, there is no doubt the sureties obliged themselves for the full amount of the bond; to the extent of the obligation of the principal, and the question is do they possess sufficient property to make good that liability. The moment we lose sight of this standard we are without any whatever. If we were to adopt the reasoning of the district judge, it would make the amount and sufficiency of the bond, to depend not upon the debt demanded, but upon the value of the effects, rights or credits which might be found by the sheriff, in executing the writ—and as it might make the obligation of the surety less extensive than that of the principal; for the amount of the bond must be clearly that required by law. The judge without knowing beforehand what property would be attached, could never ascertain before ordering the attachment to what amount solvent

If it appears the surety is not worth the full amount of the attachment bond, although he may be fully able to answer for the amount of property actually attached, the attachment will be set aside.

security should be required.

The argument drawn from the practice of justification of bail at common law, has but little weight with us, because in relation to attachment bonds they are required to be for a particular amount, and solvent sureties as a condition precedent to the issuing of the attachment, whereas the case is wholly different with bail in cases of arrest on mesne process.

We concur with the court in its conclusion, upon the matter

of fact, that the security is not sufficient for the full amount of the bond, but we think it must be treated as null and that the attachment must be set aside, whether a suit may hereafter be maintained upon it against the sureties by the defendant, by whom it has been reported as insufficient as is apprehended by his counsel, cannot be inquired into at this time. It will be time to investigate that question when the proper parties are before us.

**EASTERN DISTRICT  
March, 1841.**

**BARBOUR ET AL  
VS.  
DUNCAN'S CURA-  
TOR.**

The second ground, to wit: that the agent had not any authority to act, appears to have been abandoned.

There appears to have been a personal service of citation on the defendant as in ordinary cases, and consequently, the case must be remanded for further proceedings.

It is, therefore, adjudged and decreed, that the judgment of the district court, be reversed, that the rule to show cause why the attachment should not be set aside be made absolute, and that the case be remanded for further proceedings according to law, the plaintiffs and appellees paying the costs of this appeal.



**BARBOUR ET AL., vs. DUNCAN'S CURATOR.**

**APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF JEFFERSON.**

There is no privilege allowed by law in favor of daily or monthly laborers employed in a saw mill.

Lessors have the highest order of privileges expressly given, by taking or seizing the moveable effects of the lessee found on the property leased.

In this case the curator of the vacant estate of Arthur Duncan, deceased, presented his account of the administration of



EASTERN DIS. said estate, representing that he had fully administered it, and March, 1841. that there were not funds sufficient to pay the ordinary debts of BARBOUR ET AL the succession, after allowing the privileged demands against VS. it. He prayed that his account be homologated and that he be DUNCAN'S CURA- ordered to pay the claims against the succession according to TOR, his statement and classification.

The plaintiff in opposition, L. C. Barbour, and several other claimants made opposition charging the curator with not having accounted for all the money collected; that the account is false and untrue, and he opposes each and every item therein. He further states he is a judgment creditor of said succession, and claims to be paid by preference.

John Dunsmore, Andrew M'Cready, Wm. Haines, and D. M'Innis severally filed oppositions to the same effect as that of Barbour and set up privileged demands, being for wages and labor performed in and about a saw mill carried on by the deceased.

The Judge of Probates arranged and fixed the rank of all the claims, supported by evidence. He placed the funeral expenses first; law charges, &c., second; the opponent's claims for wages, &c., in the third privileged class, and the rent or lease of a saw mill in the fourth, &c.; disregarding many items set down by the curator as not proved; and finally he was ordered to pay several claims which he had not accounted for in his account. The curator appealed.

*Wills*, for the appellees, prayed the affirmance of the judgment.

*Roselius & M'Carty*, for the appellant, insisted that there was error. That the privilege of the landlord was superior to that of the workmen; *La. Code*, 3225.

2. The judgment is erroneous in allowing a privilege to the workmen over the landlord, &c.

*Garland, J.* delivered the opinion of the court.

The curator of the vacant succession of Arthur Duncan, EASTERN DIS. March, 1841. presented his petition to the Court of Probates stating he had administered all the effects, with a statement of the amount of the estate, from which, he says, "it will appear there are not assets sufficient to pay the ordinary claims against the succession," wherefore he prays "to be allowed to pay the debts in conformity with the order of distribution annexed," which he asks may be approved and homologated. To this petition is annexed a statement of debts, which he says have a privilege on the price of all the property, which was exclusively moveable, with the exception of a lease on a saw mill; there is also a list of ordinary debts. The usual notice was given and several opposing creditors appeared, all having claims of the same character. Their oppositions are all in nearly the same terms, and allege:

1. They are not placed on the tableau as creditors.
2. That the account or statement of the curator is false and untrue, particularly in the claim for rent of a saw mill.
3. That the curator has collected divers sums of money, and particularly the sum of \$200 from Theodore Meeks, of which he has rendered no account.
4. That the property composing the succession has not been sold.

The opponents all pray that they may be put on the list of creditors with a privilege, that the claim for rent of the saw mill be rejected, or if allowed, that their claims be preferred to it, that Bach be compelled to account for all the money he has received and do every thing else necessary to a just and speedy settlement of the succession.

Each of the opponents produced in support of his claim a judgment in the Probate Court against the curator. That of D. M'Innes is "for services rendered at the saw mill as a sawyer." L. C. Barbour's claim is "for services rendered at the saw mill as a fireman." M'Cready's claim is for "work done

**EASTERN DIS.** at the saw mill." Haines' is for "work in the saw mill," and *March, 1841.* and Dunsmore's is for "services rendered at the saw mill."

**BARBOUR ET AL.** In each judgment, a "privilege according to law" is al-  
*vs.*  
**DUNCAN'S CURA-** lowed.  
**TOR.**

In support of the claim for rent a notarial act is filed, dated July 15th, 1836, by which Bach, W. L. Hodge and M. Gordon, Jr., lease to Duncan for three years, the saw mill, lot, &c. in the faubourg Delassize, at an annual rent of \$2500, payable semi-annually; the sum of \$500 to be deducted from the first payment for improvements and repairs. Bach, for himself and co-lessors, claims an installment on the rent, less the sum of \$500, and puts down the claim on his list of debts as one for \$750 with a privilege, after the funeral expenses and law charges. Duncan died on the 2d of December, 1836, the curator was appointed on the 2d of January, 1837, and the seals were removed and inventory made on the 6th of February following.

Upon this evidence the parties went to trial in the inferior court, and the judge allowed the amount of the claim for rent, he ordered the opponents to be placed on the list of creditors for the amount of their respective claims, and ordered the curator to add to the mass of the succession certain sums by him collected and not accounted for, but to what amount neither the record or judgment informs us. In settling the order of privileges, the court preferred the claims of the opponents, under the name of "wages of the hands," to the claim for rent. From this judgment the curator appealed.

Many of the questions which the opponents seemed desirous of raising, were not noticed in the court below and have not been alluded to here. The opponents presented prematurely several points that cannot be examined until the curator presents his final account, the amount of the funds received by him, and his management of the affairs of the succession will then be investigated and he made responsible for the manner

of his administration. The object of the present proceeding is to ascertain the names of the creditors, the amount of their debts, to settle their rank and privileges, and obtain the order of the court to pay the debts that shall be admitted as due or owing, all other questions are reserved, until the final account shall be presented.

EASTERN Dis.  
March, 1841.

BARBOUR ET AL.  
VS.  
DUNCAN'S CURA-  
TOR.

The Probate Court is correct in its allowance and classification of the funeral and law charges; we think the claims of the opponents are fully sustained by the evidence, as is also the claim for rent, and the parties are properly placed on the list as creditors, but we think the judge erred in allowing the opponents a privilege of a higher order than that of the lessors of the saw mill, and further in allowing them any privilege at all. The counsel for the opponents has not in the argument referred us to any law which gives his clients a privilege on the mass of the estate or any particular portion of it, and we have looked in vain for any such provision in our Code, which at article 3152 says, privileges are only to be allowed when expressly granted. There are no privileges by implication or construction, and we cannot find any granted to laborers employed in a saw mill at daily or monthly wages. In favor of lessors, privileges of the highest order are expressly given. The article 2675 of the Code says, "lessors have for the payment of rent, a right of pledge on the moveable effects of the lessee found on the property leased. Article 3185 says the rights of the lessor are of a higher nature than a mere privilege. He may take the thing itself and keep it until he is paid, whilst other creditors can only enforce their claims upon the price. The article 3225 ranks the privilege of the lessor before the expenses of the last illness, and does not leave a doubt in this case as to the priority of the claim for rent over those of the opponents.

There is no privilege allowed by law in favor of daily or monthly laborers employed in a saw mill.

Lessors have the highest order of privileges expressly given by taking or seizing the moveable effects of the lessee found on the property leased.

Bach, the curator of the estate, with his petition presented an account or list of debts owing to himself, amounting to

**EASTERN DIS.** \$2082 54, with a view of having them recognized as debts  
March, 1841. against the succession; their justice was directly put at issue  
**BARBOUR ET AL.** by the opponents, he has offered no evidence to establish them,  
 vs. the court seems to have disregarded them, and we think properly.  
**DUNCAN'S CURA-** It does not appear there are any other creditors; it is  
**TOR.** therefore easy to classify those before us and direct payment to them.

The judgment of the Probate Court is therefore annulled and reversed so far as it grants a privilege to any of the opponents; the tableau is to be so amended, and the curator will pay:

1st. The funeral expenses.

2d. The law charges, including all the expenses of settling the succession.

3d. The claim for rent, amounting to seven hundred and fifty dollars.

The balance of the funds which shall be found belonging to the succession, to be paid to the opponents as chirographic creditors, to be taken pro rata, if there shall not be a sufficient amount remaining to pay them all. It is further ordered, the costs of this appeal shall be paid by the opponents, those in the Court of Probates by the curator out of the funds belonging to the succession.

## THERIOT vs. CHAUDOIR ET AL.

EASTERN DIS.  
March, 1841.

APPEAL FROM THE COURT OF THE SECOND DISTRICT, FOR THE PARISH OF AS-

SUMPTION, THE JUDGE OF THE FOURTH PRESIDING.

THERIOT  
vs.  
CHAUDOIR ET AL

A sale of plaintiff's *pretensions* to a tract of land, the title to which was in the United States, but both parties being ignorant that it had been comprized within the "live oak reservations," and was not liable to entry, is an error in the motive sufficient to rescind the sale.

Where the price is stipulated in a sale is large, and it is even doubtful as to error in the motive, the court will incline in favor of a party striving to avoid loss, against one seeking to obtain gain.

This is an action against the makers of a promissory note, given in part of the price of plaintiff's pretensions to 2 sections of public land. The defendants admitted their signatures, but averred they owed nothing as the note sued on was given in error and without consideration. They further aver, that for the price of \$2700, they purchased the plaintiff's *pretensions* to a certain tract or quantity of land, and that he sold and they intended to purchase a *right* to sections 21 and 22, in township 14, range 13, East on the West side of Lake Verret. It has since been shown that the plaintiff had in fact no right, title or interest, *or pretensions*, to said land; that it belonged to the government of the United States, and at the time of this sale was reserved for the live oak growing thereon, to be used for naval purposes; and there was no pre-emption law then in existence under which it could be entered, nor was it ever subject or liable to entry. The defendants further show that they gave five notes for the price, payable at different times; one of which they had paid; the second was sued on, and the remaining three are yet in the possession of the plaintiff. They pray that his demand be rejected; the sale rescinded, and that the money paid and notes given be all refunded and returned to them.

Upon these pleadings and issues, the cause was tried.

The evidence showed that both parties knew the land in question was public and belonged to the United States, but



**EASTERN DIS.** they both acted under the belief that it could be purchased at  
*March, 1841.*

**THERIOT  
vs.  
CHAUDOIN ET AL**

the government price. On making application at the land office the purchasers were informed these two sections with a quantity of other public land was reserved by the President of the United States, for naval purposes in preserving the live oak forest growing thereon, and was entirely exempted from purchase, sale or occupation by individuals. Both parties appear to have been ignorant of the "live oak reservation." They have agreed to reserve the value of the plaintiffs improvements, stock, &c., which had been sold with the land, until the question of rescission of the sale was determined.

The district judge rendered judgment rescinding the sale, and decreeing a return of the notes and refunding the amount paid. The plaintiff appealed.

*Miles Taylor*, for the plaintiff.

*Isley and Nicholls*, for defendants.

*Morphy, J.* delivered the opinion of the court.

This is an appeal from a judgment avoiding and setting aside a sale on the ground of error in the motive which induced the purchase. The plaintiff, sold, conveyed and set over to defendants all his *pretensions* to a certain tract of land lying and being in the parish of Assumption. At the time of the sale both parties knew that the title to the land was in the United States; but both were ignorant that it had been long before comprized within the live oak reservations, and could not be bought from government. The defendants who resist the payment of the price, say that the expectation of being able one day to buy this land from the United States was the motive which to the knowledge of plaintiff, influenced their will and determined them to enter into this contract; that they were led by plaintiff to believe that he had that sort of possession which from time to time Congress has approved of as entitling the possessor to a preference in a purchase from the United

States; and that it was only after the purchase that they discovered the fact that this land would probably never be offered for sale; being reserved and set apart for naval purposes. It is contended on the part of the plaintiff, that he did not sell or pretend to sell the land, or any title to it, but only his pretensions such as they were; that he had the peaceful possession and enjoyment of this land and of the improvements he had made on it and was entitled to be maintained therein against all the world except only the United States; that he sold this possession and enjoyment and the hope that the United States would permit it to be continued. The term *pretensions* employed in the deed of sale might well be considered as embracing only the mere use or enjoyment which the plaintiff had of the land and the chance of its continuance without interruption: this could surely have been the object of a sale; La. Code, 1879—2424—2426. But the testimony shows, we think, what the parties themselves actually understand by the expression, *pretensions to the land*. Before the bargain was made, they were heard conversing together about the sale and more particularly about the means by which the land could be purchased from the United States, and shortly after, the defendants expressed the wish of making immediate application for the purchase of the land and gave the numbers of the sections, townships, range, &c., to a person to take the necessary steps. From this conversation between the parties it is clear that the *pretensions* intended to be conveyed were those which plaintiff's possession was supposed to entitle him to in preference to other persons in a purchase from the United States, but both parties were then ignorant that the land had been by the proper authorities and under a law of Congress selected and set apart to secure the live oak growing on it for naval uses: had the purchasers been aware of that appropriation which precluded them, in the event of a passage of a pre-emption law, from availing themselves of its provisions, it may well be presumed that they would not have purchased: although there

EASTERN Dis.  
March, 1841.

THEBIOT  
VS.  
CHAUDOIR ET AL

A sale of plaintiff's *pretensions* to a tract of land, the title to which was in the United States, but both parties being ignorant that it had been comprized within the "live oak reservations," and was not liable to entry, is an error in the motive sufficient to rescind the sale.

**EASTERN DIS.** was not at the time of the sale an existing law in favor of actual settlers, yet it was a matter of general expectation, subsequently realized by the action of Congress, that one would

**M'DONALD**

**vs.**

**AUBERT.**

be shortly passed and these defendants sought to acquire a settlement which such a law would protect. This law was passed, but defendants could not enter the land because, by reason of its reservation, the plaintiff had not acquired to it those pretensions which were intended to be transferred to defendant; the motive that induced the purchase was made known to the plaintiff, who himself, was in error as well as defendant, as to

Where the price stipulated in a sale is large, and it is even doubtful as to error in the motive, the court will incline in favor of a party striving to avoid loss, against one seeking to obtain gain.

the right to the land supposed to exist in him and which formed the true consideration of this contract, La. Code, arts. 1819—1820. But even were this case doubtful with us, we would come to the same conclusion. The price stipulated for the plaintiff's pretensions was a large one, and in a case of doubt would incline in favor of a party striving to avoid a loss against one seeking to obtain a gain.

It is, therefore, ordered, that the judgment of the district court, be affirmed, with costs.

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**M'DONALD vs. AUBERT.**

APPEAL FROM THE COURT OF THE SECOND DISTRICT, FOR THE PARISH OF LAFOURCHE  
INTERIOR, THE JUDGE THEREOF PRESIDING.

A promise to sell, when the thing sold and the price of it are agreed on, is so far a sale that it gives to either party a right to claim *rectâ via*, the delivery of the thing or payment of the price; but the promise does not place the thing at the risk of the promisee, or transfer to him the ownership or dominion of it.

This case commenced by an order of seizure and sale; for

the payment of \$3,864 ; being the balance of a note given by the defendant in part payment of a sugar plantation, having 8 arpents front, on the bayou Lafourche with the depth of 80, and 21 slaves.

EASTERN DIS.  
March, 1841.

M'DONALD  
VS.  
AUBERT.

The defendant opposed the order of seizure and obtained an injunction prohibiting the sheriff from proceeding any further, on account of various incumbrances and mortgages existing on the land and slaves sold, which he specifies. He expressly avers, that the plaintiff bound himself to make him a clear and unincumbered title to the premises, but that he has failed ; and that he also concealed several mortgages existing at the time of sale. He prays that the plaintiff may be required to erase and cancel all the existing mortgages and incumbrances ; and that in the meantime he give security and pay him 1000 dollars, for his trouble, vexation and expense.

The particular facts on which the case turns are fully stated in the opinion of the court.

The district judge perpetuated the injunction and the plaintiff appealed.

*Beatty*, for the plaintiff and appellant.

*B. G. Thibodeaux*, for defendant.

*Morphy, J.* delivered the opinion of the court.

The plaintiff sued out an order of seizure and sale, for part of the price of a plantation and slaves sold, to the defendant. The proceedings were enjoined on the latter on the ground that there were defects in his title and incumbrances on the property which give rise to a just and reasonable fear on his part of being disquieted in his possession by an action of mortgage or of revendication. There was below a verdict for the defendant, whereupon a judgment was rendered making the injunction perpetual. The plaintiff appealed.

On the 1st of April, 1835, Benedict & Stanfield the immediate vendors of plaintiff, purchased two arpents out of the

**EASTERN DIS.** eight sold by them to plaintiff, and by him to defendant, from March, 1841.

**M'DONALD**  
**VS.**  
**AUBERT.**

**Estival Baudoin**, for the sum of \$3250. Previous to this sale, to wit: on the 19th of February, preceding, the said **Estival Baudoin**, jointly with **Sylvain Baudoin** and **Jean Baudoin**, had entered into an agreement with **Benedict** and **Stanfield**, by which they had promised and bound themselves to sell and make over to them within a delay not exceeding thirty days, their three adjoining plantations, measuring together eight arpents front to the bayou Lafourche; the promisees obligated themselves to purchase the three tracts, for \$13,000, to be paid cash down at the passing of the sale to them; and as an earnest they paid a thousand dollars, which sum, it was agreed, should be forfeited, if they did not comply with their promise to purchase and to pay within thirty days from the date of the agreement. The wife of **Estival Baudoin**, died on the 23d of March, following, leaving several heirs; the two arpents subsequently sold by him to **Benedict** and **Stanfield**, are proved to have been acquired during his marriage with the deceased.

Under these facts the defect complained of in plaintiff's title, is that the sale of these two arpents by **Estival Baudoin** after the death of his wife, conveyed only his undivided half of the property which had belonged to the community, and that the rights of her heirs to the other half have never been legally directed.

It is contended on the part of the appellant, that under articles 2437 and 2438 of our Code, the promise to sell amounted to a real sale, to which a resolatory condition was attached by the joining of an earnest, but that the parties not having taken advantage of this condition, the sale became absolute, and that its validity cannot be affected by the subsequent death of the vendor's wife.

We cannot concur in this view of the agreement entered into by these parties on the 19th of February, 1835. We un-

derstand article 2437, to mean that a promise to sell, when the thing to be sold and the price of it are agreed upon, is so far a sale that it gives to either party a right to claim *rectâ viâ*, the delivery of the thing or payment of the price; but such a promise does not place the thing at the risk of the promisee, nor does it transfer to him the ownership or dominion of it. If by consent of both parties a promise to sell is cancelled, such an agreement could not be viewed as a retrocession of the property; and third persons having a general mortgage recorded against the promisee would have acquired no right or lien on the same, because it never belonged to their debtor. Troplong Vente 1st Vol. No. 130. Pothier Vente, No. 481. Toullier 9 Vol., No. 163. In this case, the promise to sell is made in terms and under conditions which exclude all idea of an actual sale. It was to be executed at a future day and within a given time, and an earnest was paid by the promisees: Each party had the right of receding from the agreement, the promisees by losing the earnest money, the other party by returning the double of its amount, La. Code, art. 2438. But besides the promissors intended to be bound by this agreement, only during thirty days; neither party having called for its execution within that time, it became null and void, Troplong Vente, 1st Vol., No. 134. Pothier Vente, No. 480. Far from transferring the property to Benedict & Stanfield, this promise could not even have been enforced against Estival Baudoin as an absolute obligation to sell, because although an aggregate amount of \$13,000 stipulated for the eight arpents, no separate price was fixed or agreed to for the two arpents which were his individual property; he was divested of his ownership then only by the sale of the first of April, after the death of his wife; the interest of his children he could not and did not convey by that act; the defendant Aubert is therefore entitled to be secured against eviction on account of their rights.

As to the incumbrances on the land, they were all made

EASTERN DIS.  
March, 1841.

M'DONALD  
VS.  
AUBERT.

A promise to sell, when the thing sold and the price of it are agreed on, is so far a sale that it gives to either party a right to claim *rectâ viâ*, the delivery of the thing or payment of the price; but the promise does not place the thing at the risk of the promisee, or transfer to him the ownership or dominion of it.



**EASTERN Dis.** known to defendant, except a judgment recorded in favor of  
March, 1841. one Eaggleston, for \$247, which was not disclosed at the time,  
of the sale, having been overlooked by the parish judge, who  
**DOUGHERTY** drew up the conveyance to defendant. The evidence renders  
**ET AL.** it probable that this judgment has been satisfied, but is not  
**vs.** such however, as should preclude defendant's right to require  
**CRUMBAUGH.** security against this mortgage.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be so amended, that the injunction sued out by defendant, instead of being perpetual, be maintained until plaintiff shall give security in the sum of \$1900, according to article 2535, of the Louisiana Code, the defendant and appellee paying the costs of this appeal.

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**DOUGHERTY ET AL., vs. CRUMBAUGH.**

**APPEAL FROM THE COURT OF THE FIRST DISTRICT:**

A party having obtained judgment on a note in another State, cannot sue on the note, or on an account made up from the judgment and costs. He must sue on the record of the judgment, not on a parol acknowledgment of its correctness and amount.

This is an action first instituted on a promissory note of the defendant, and on oyer craved, an amended petition was filed stating that the note was in Missouri, where judgment had been obtained on it; and that the defendant had made a written

acknowledgment of the amount of said judgment, interest and costs, which was annexed, and for which he prayed judgment.

EASTERN Dis.  
March, 1841.

DOUGHERTY  
ET AL.  
VS.  
CRUMBAUGH.

The defendant apposed the plea of *res judicata*; and averred that the note and debt were merged in the judgment rendered in Missouri.

On these pleadings and issues the case was submitted to the District Court.

The defendant objected to the account sued on being offered in evidence, which was overruled and the account admitted.

Judgment was rendered in favor of the plaintiffs, and the defendant appealed.

*Vason*, for the plaintiffs.

*Rozier*, for defendant.

*Martin, J.* delivered the opinion of the court.

The plaintiffs instituted suit on a promissory note of the defendant. The latter craved oyer, and afterwards a supplemental petition was filed wherein the plaintiffs state that the note had been sent to the State of Missouri for collection and judgment obtained thereon there; and the note being on the files of the court, could not be withdrawn and oyer given of it. A second supplemental petition is now filed stating that the defendant had made a written acknowledgment of the amount of the note, interest and costs, according to the judgment rendered thereon in Missouri.

The defendant pleaded *res judicata*, the judgment obtained in the State of Missouri, in which the plaintiffs' debt on the note was merged and extinguished. The plaintiffs' had judgment and the defendant appealed.

It appears to us the District Court erred. Whatever may be the practice in the common law States, an action cannot be supported here on a judgment obtained in this State, nor even execution sought in any other court than that in which

**EASTERN DIS.** judgment was rendered ; Canal Bank et al., *vs.* Copeland, 12  
March, 1841. **La. Reports, 34.** It is otherwise as to judgments obtained in  
**STEPHENSON'S** a sister State or foreign country ; for as to them it becomes  
**ADMINISTRATOR**  
**vs.** often necessary to institute suit in order to arrest the person of  
**ADDISON ET AL.** the defendant, &c. The plaintiffs might, therefore, have

A party having brought suit on the record of the judgment rendered in Mis-  
obtained judgment on a note souri, but not on a parol acknowledgment of it by the defen-  
in another State, dant.  
cannot sue on  
the note or on an  
account made up  
from the judg-  
ment and costs. It is therefore ordered, adjudged and decreed that the judg-  
He must sue on ment of the District Court be annulled, avoided and reversed ;  
the record of the and that there be judgment for the defendant as in case of  
judgment, not on non-suit ; the plaintiffs and appellees paying costs in both  
a parol acknow-  
ledgment of its  
correctness and  
amount. courts.

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**STEPHENSON'S ADMINISTRATOR vs. ADDISON ET AL.**

APPEAL FROM THE COURT OF THE EIGHTH DISTRICT, FOR THE PARISH OF ST. HELENA,  
THE JUDGE THEREOF PRESIDING.

Where the purchaser of a slave at Probate sale, remains in the undisturbed pos-  
session, and has paid part of the price, it will be considered a ratification of  
the sale and he cannot resist payment of the balance.

If a sale becomes valid by ratification of the purchaser, and the seller seeks pay-  
ment there can be no danger of eviction when no third party makes any claim:

This is an action by the administrator of one Presly L. Ste-  
phenson's estate to recover the amount of a note given in part

of the price of a slave sold at Probate sale and purchased by the defendant, Addison.

EASTERN DIS.  
March, 1841.

The defendant and his surety pleaded the general issue, and averred that the sale was illegal and conferred no title on the purchaser; and refer to the case of *Morris et al. vs. Kemp*, 14 La. Reports, 251, in support of the averment; that the sale being illegal they are in danger of eviction, and entitled to security before payment is demanded. They pray, however, for a rescission of the sale with the return of so much of the price as they have paid and of their notes for the balance.

STEPHENSON'S  
ADMINISTRATOR  
VS.  
ADDISON ET AL.

The District Judge was of opinion that all the formalities of law relating to the sale of property in which minors are interested had not been observed, but as the suit was brought to enforce the sale by the legal representative of the minor, alone interested, that the defendants could not complain; especially when it was shown the purchaser was in possession and no danger of eviction from any other quarter.

There was judgment for the plaintiff and the defendants appealed.

*Sheafe*, for the plaintiff and appellee.

*Lawson & Baylies*, for the defendants.

*Bullard, J.* delivered the opinion of the court.

This is an action brought by the administrator of the estate of one Stephenson to recover the price of a slave sold at the Probate sale of the estate. Judgment was rendered against the purchaser and his surety, and they appealed. The appellants make two points to this court: 1st. That the sale of the slave was a nullity and conveyed no right, as was decided by this court in the case of *Morris et al. vs. Kemp*, 14 La. Rep., 251. And 2d. That if the court should sustain the sale and enforce the obligation of the defendants, yet they are entitled to security against eviction.

EASTERN DIS.  
March, 1841.

STEPHENSON'S  
ADMINISTRATOR  
VS.  
ADDISON ET AL.

I. The report of the case relied upon, shows that the purchaser of a tract of land, at the same Probate sale obtained a monition under the act of 1834, and that the tutor of the minor heir of Stephenson made opposition on the ground of radical nullities in the proceedings, which led to the sale, and that the land did not sell for its appraised value. Upon appeal to this court the opposition was sustained and the sale of the land cancelled. But the sale of the slave purchased by the defendant was not questioned in that case. The purchaser appears to be in the undisturbed possession of him, and as this suit is brought by the legal representative of the estate to recover the price, we concur with the judge of the district in opinion that it amounts to a ratification of the sale.

If a sale becomes valid by ratification of the purchaser, and the seller seeks payment of the price, it will be considered a ratification of the sale and he cannot resist payment of the balance. II. Our opinion upon this second point is but a corollary from that first expressed, for if the sale be rendered valid by ratification and the payment of the price, there is no danger of eviction on the part of the estate of Stephenson, and none is shown or even pretended from any other quarter. The judgment of the District Court is therefore affirmed with costs.

OF THE STATE OF LOUISIANA.

457

L. & T. F. SHEWELL vs. RAGUET.

EASTERN DIST.  
March, 1841.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

L. & T. F. SHEW-  
ELL,  
vs.  
RAGUET.

The evidence of a fact, happening in a different country from that of the *lex loci contractus*, must be tested by the rules of evidence in this state, where the remedy is sought.

So, the testimony of one witness, that a debt, contracted in the state of Pennsylvania, exceeding 500 dollars in amount, was *acknowledged* by the debtor, in his presence, in Texas, is insufficient without some corroborating circumstance, to make proof of and establish the demand in a court of Louisiana.

The pleas of prescription; and of a discharge, under a protestation that the debt was never due, do not amount to a waiver of the plea of the general issue.

This is an action instituted in April, 1837, on an account of the defendant, contracted in Philadelphia, in August, 1832, amounting to \$2767,80, with interest to first October, 1835, for goods and merchandize sold and delivered to him by the plaintiffs.

The defendant pleaded a general denial, and prescription. He further averred, that in December, in 1832, in the state of Ohio where he then resided, he was discharged from all his debts by a court of competent jurisdiction, according to the laws of Ohio; that the plaintiffs were made parties to said proceeding and are bound by it.

Upon these pleadings and issues, the cause was tried.

J. Hise, Esq., witness for plaintiffs, states that the account sued on was put into his hands in 1836, when going to Texas, to present and collect. That he met the defendant soon after in Nacogdoches, and presented the account, which he acknowledged to be correct, and gave him a horse on account of it, that he afterwards sold for \$100. The defendant did not hesitate to acknowledge the correctness of the account sued on.

The district judge was of opinion that the plea of the general issue was waived by the pleas of prescription and a discharge under the insolvent laws of Ohio, which he considered special pleas; that the proof was sufficient under these cir-



EASTERN Dis. cumstances to establish plaintiff's demand. There was judgment accordingly, and the defendant appealed.

March, 1841.

L. & T. F. SHEW-

ELL.

VS.

RAGUET.

Chinn, for plaintiff.

Preston, contra.

Martin, J. delivered the opinion of the court.

The defendant is sued on an account for goods and merchandize sold and delivered to him in the state of Pennsylvania; he being at the time a resident of the state of Ohio. He pleaded the general issue; prescription and a discharge from his debts under the insolvent laws of Ohio; and he is appellant from a judgment against him.

There has been no proof of the account administered, except the testimony of one witness, who deposes that being employed to collect this debt, he presented the account to the defendant in Texas and was answered that it was correct and he received a horse valued at one hundred dollars in part payment. The counsel for the appellees contends that the debt is sufficiently proved by one witness without any corroborating circumstances, because such proof suffices in the state of Pennsylvania, where the debt was contracted; the laws of that State in this respect being in evidence; that if any corroborating circumstance is required, it results from the pleas of prescription and discharge, and indeed that these pleas are a waiver of the general issue.

So, the testimony of one witness, that a debt, contracted in the State of Pennsylvania, exceeding 500 dollars in amount, was acknowledged by the debtor, in his presence, in Texas, is insufficient without some corroborating circumstance, to make proof of the demand in a court of La. We are not ready to say that if the *res gesta* in Pennsylvania, was proved by a witness present at the time of the contract, such proof would not suffice. But we have before us evidence of a fact, which happened in the Republic of Texas, long after the contract. The case is not before us on evidence procured at the time the contract was made, according to the *lex loci contractus*. It must therefore be tested according to the rules of evidence in this State. According to these there

must be some corroborating circumstance to support the testimony of the witness. La. Code, 2257. EASTERN Dis.  
March, 1841.

We do not discover any corroborating circumstance in the plea of prescription; which is, that the suit was not brought in due time. The discharge pleaded in this case is under a strong protestation, that the debt was never due, and the plea is not inconsistent with the non-existence of the debt. Neither of these pleas is a waiver of that of the general issue. THOS. SHEWELL  
vs.  
RAGUET:  
The pleas  
of prescription;  
and of a discharge,  
under a protestation  
that the debt  
was never due,  
do not amount  
to a waiver of  
the plea of the  
general issue.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court, be annulled, avoided and reversed, and that there be a judgment of non-suit against the plaintiffs, with costs in both courts.

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**THOMAS SHEWELL vs. RAGUET.**

**APPEAL FROM THE COURT OF THE FIRST DISTRICT.**

In an action of debt on an account the pleas of prescription, and discharge under the insolvent laws of another State, do not amount to a waiver of the plea of the general issue.

This is an action on a merchant's account, contracted in Philadelphia, in 1832, amounting to \$1613, with interest added to October 3d, 1835. The defendant pleaded the general issue; and also prescription and a discharge under the insolvent laws of Ohio before the account became due.

A witness declared, that he presented this account to the defendant, in Texas, in 1836, who acknowledged that it was correct, and he would settle it.

EASTERN DIS.  
March, 1841.

THOS. SHEWELL  
vs.  
RAGUET.

On this evidence there was judgment for the plaintiff, and the defendant appealed.

*Chinn*, for plaintiff.

*Preston*, contra.

*Martin, J.* delivered the opinion of the court.

The defendant is sued on an open account, for goods and merchandize sold and delivered to him in the state of Pennsylvania; he being at the time a resident of the state of Ohio.

In an action of debt, on an account, the pleas of prescription and discharge under the insolvent laws of another State, do not amount to a waiver of the plea of the general issue.

He pleaded the general issue, prescription and a discharge under the insolvent laws of Ohio. There was a judgment against him, and he appealed.

The facts and circumstances of this case are precisely the same as those of the case of *L. & T. F. Shewell* against the present defendant, just decided; and the judgment must be the same in this, as was rendered in that case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court, be annulled, avoided and reversed, and a judgment of non-suit entered against the plaintiff, with costs in both courts.

## BOATNER vs. WALKER ET AL.

EASTERN DIS.  
March, 1841.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF EAST

FELICIANA, THE JUDGE THEREOF PRESIDING.

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BOATNER  
vs.  
WALKER ET AL.

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An affidavit, stating that all the material allegations in the foregoing petition are just and true, and that the facts are such as in the opinion of the affiant authorise the issuing of an injunction, is *insufficient* to support the injunction. The materiality of facts and their sufficiency to sustain an injunction, are matters of law, which must be decided on by the court.

This is an injunction case. The plaintiff alleges, that he is the owner of a certain judgment and 12 months bond taken under it, in the name of Charles Gardiner against Millican and others, on which execution has issued at the instance of Gardiner & Co., and the sheriff is now proceeding to sell property and make the money. He prays for an injunction restraining the execution of said judgment and enjoining the sheriff and Gardiner from proceeding therein.

At the foot of the petition the plaintiff made his affidavit, which is copied into the opinion of this court.

The defendant, Gardiner, appeared by counsel and filed written grounds for its dissolution, because of the insufficiency of the affidavit, and other causes.

On hearing the parties the district judge dissolved the injunction with damages, interest and costs. The plaintiff appealed.

*Lawson and Lyons*, for the plaintiff and appellant.

*T. L. Andrews*, contra.

*Bullard J.* delivered the opinion of the court.

This case turned in the court below, upon the insufficiency of the affidavit upon which the injunction was granted on a motion to dissolve it on that and several other grounds. The plaintiff made oath "that all the *material* allegations in the foregoing petition are just and true ; that he obtained the judg-

**EASTERN DIS.** ment aforesaid, against Morgan & Carlin and Babcock ; that  
**March, 1841.** the note was renewed and that Charles Gardiner brought suit

**BOATNER** on it, and obtained a judgment, and that subsequently this affi-  
**vs.** ant had it levied on and at the sheriff's sale bought it and that  
**WALKER ET AL.** the sheriff has property under seizure and will proceed to make  
the money, and pay it over to the said Charles Gardiner, un-

less enjoined, &c., and that the facts are such as in the opinion  
of the affiant authorise the issuing of the injunction."

The first and last clauses of this affidavit, to wit: that the  
*material facts are true and that they are such as in the opinion*  
of the affiant render an injunction proper, are clearly insuffi-  
cient. The materiality, of the facts and their sufficiency to au-  
thorise an injunction are matters of law, 5 La. Rep. 246.

The other facts sworn to, do not appear to us sufficient to  
authorise the issuing of the injunction. It does not appear  
that the judgment in execution of which the property of Gar-

diner, to wit: his judgment on the renewed note, was seized  
against Gardiner; if it was not, Gardiner's property did not  
pass by the sheriff's sale, and the fraudulent character of the  
contract by which he became possessed of the note cannot be  
enquired into, commencing with an execution. The party had  
his regular revocatory action to set aside those contracts, and  
transactions of which he complains, and especially the last by  
which it is alleged, the note was renewed and suit brought  
upon it in the name of Gardiner; nor does it appear by the  
affidavit, that Gardiner was a party, to the suit against Morgan  
& Carlin and Babcock, which it is alleged resulted in the  
judgment against the latter to deliver up the note in question.

It is, therefore, ordered, adjudged and decreed, that the  
judgment of the district court, be affirmed, with costs.

An affidavit,  
stating that all  
the material al-  
legations in the  
foregoing peti-  
tion are *just*  
and true, and  
that the facts  
are such as in  
the opinion of  
the affiant au-  
thorise the is-  
suing of an in-  
junction, is *in-*  
sufficient to  
support the in-  
junction.

The materi-  
ality of facts  
and their suffi-  
ciency to sus-  
tain an injunc-  
tion, are matters  
of law, which  
must be decided  
on by the court.

**WHITEMORE & YOUNG vs. LEAKE & HOWELL.**EASTERN Dis.  
March, 1841.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF WEST

FELICIANA, THE JUDGE THEREOF PRESIDING.

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**WHITEMORE  
& YOUNG  
vs.  
LEAKE  
& HOWELL.**

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The jury tax in some of the parishes, required to be paid by the party cast, or who discontinues his suit, does not make part of the legal costs to be taxed in the suit and paid, before another suit can be instituted.

The payment of the ordinary taxed costs of the clerk's and sheriff's fees is a sufficient compliance with the article 492 of the Code of Practice, to authorize a party non-suited, or who discontinues, to begin again.

This is an action against the endorsers of a promissory note.

The defendant, Leake excepted to the petition on the ground that a former suit had been instituted by the same plaintiffs against these defendants, and a judgment of non-suit rendered against the plaintiffs, and that they have not paid the costs of the former suit before commencing this one.

The clerk's and sheriff's receipts for their costs were produced in evidence. But the tax fee allowed to the jury did not appear to be paid.

There was a judgment of non-suit, and the plaintiffs appealed.

*Thomas & Bowman*, for the plaintiffs.

*Turner*, contra.

*Morphy, J.* delivered the opinion of the court.

This case comes before us on a bill of exceptions to the opinion of the judge below dismissing the petition on the ground that the costs in a former suit of plaintiffs against these defendants, in which they took a non-suit, had not been paid before bringing the present action.

On the trial, the plaintiffs and appellants proved by the receipts of the clerk and sheriff that their respective costs had been paid, but the court was of opinion that the jury tax constituted a part of the costs, and as it had not been shown spe-



EASTERN Dis.  
March, 1841.

WHITTEMORE  
& YOUNG

vs.

LEAKE  
& HOWELL.

The jury tax in some of the parishes, required to be paid by the party cast, or who discontinues his suit, does not make part of the legal costs to be taxed in the suit and paid, before another suit can be instituted.

The payment of the ordinary taxed costs of the clerk's and sheriff's fees, is a sufficient compliance with the article 492 of the Code of Practice, to authorise a party non-suited or who discontinues to begin again.

cifically to have been paid, the plaintiffs were non-suited. By reference to the statute assessing a jury tax, in 1 Moreau's Digest, 627, section 4, we find that the clerks of the district courts of the several parishes shall deliver to the sheriff or collector in the month of January in each year a certified list under the seal of the court, containing the names of the persons who shall have instituted a suit or suits, liable to taxation, together with the number of suits instituted by each, which list shall be a sufficient authority for the sheriff or collector to demand and receive said tax, &c. It further provides that said tax shall be collected by the sheriff or collector of taxes in the same manner as is provided by law for the collection of the state and parish taxes, &c. It is clear that this tax when the plaintiff discontinues or is cast in the suit, is not to be included in the bill of costs which the clerk and sheriff have a right forthwith to demand.

It becomes legally due and can be required only in the course of the year next following the institution of the suit; until then the plaintiff remains liable for the tax, but we do not think that in a case of discontinuance he should be prevented from renewing his suit until the following year, because he has not paid that which he was not yet legally bound to pay, and which, had he tendered to the sheriff, the latter was perhaps without authority to receive. The payment of the ordinary taxed costs of the clerk and sheriff appears to us a sufficient compliance with article 492 of the Code of Practice. The peculiar mode provided for the collection of this tax on suits, places it, we think, on a different footing from the other costs incurred by the parties. It goes into the parish treasury and should not in strictness be viewed in the light of costs.

It is, therefore, ordered, that the judgment of the district court be reversed and annulled; that the exception taken by the defendant, Leake, be overruled, and that the case be remanded for further proceedings; the costs of this appeal to be paid by the appellee.

**POLICE JURY OF ST. HELENA vs. FLUKER, ADMR.** EASTERN DIS.  
March, 1841.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF EAST FELICIANA.

A motion to dismiss, after an appeal has been pending more than three years, and since the passage of the act of 1839, comes too late and will be overruled, to allow further time to correct errors of citation, &c.

When none of the errors in bringing up an appeal are imputable to the appellant, he will be allowed further time to correct such errors.

The plaintiffs having obtained a judgment against the defendant, the latter took an appeal the first January, 1838, returnable to the first Monday of June following. The cause was decided by the court of probates, for the parish of East Feliciana, and citation and petition of appeal was served on the attorney of the appellees; they being a body corporate existing in the adjacent parish.

For improper service of citation and various other causes the counsel for the appellee, moved to dismiss the appeal at the February term, 1841; more than three years after it was taken.

*Muse*, for the plaintiffs, insisted on the motion to dismiss.

*Andrews*, contra.

*Martin, J.* delivered the opinion of the court.

The dismissal of the appeal is prayed for on account of the service of petition and citation of appeal having been made on the attorney of the appellees, although the latter are residents of the state.

2. That there was not sufficient time from the service of the process of appeal to the return day for the appellees to answer in; it appearing that there were only eleven days allowed when they were entitled to twenty.

3. That the record is certified by the "*parish judge*," instead of the "*judge of the court of probates*."

The appeal in this case was granted the first of January, 1838, and made returnable to the first Monday of June fol-

EASTERN DIS.  
March, 1841.

POLICE JURY OF  
ST. HELENA  
vs.  
VLUKER, ADM'R.

lowing. No motion was made to dismiss during the remainder of that year, nor in that of 1839, in which the remedial law in case of appeals was passed; nor during the whole of the following year. We think the appellee is too late in his objections to the appeal, and in his motion to dismiss, to prevent this court from extending to the appellant, the benefits of the act of 1839, allowing further time to correct errors of service of citation, &c. See the case of *Perkins vs. Dixon tutor, &c.* just decided. Session acts of 1839, sec. 19, pages 162—170.

A motion to dismiss, after an appeal has been pending more than three years, and since the passage of the act of 1839, comes too late and will be overruled, to allow further time to correct errors of citation, &c.

I. The appellee seeks to avail himself of an error in the service of citation and petition of appeal, on the ground that it was made on an improper person.

II. The second ground of dismissal is also an error in the service of the process of appeal.

III. The last ground stated, is an irregularity in the judge's certificate to the record, in attesting it as *parish judge*, when he should have signed as *judge of probates*.

When none of the errors in bringing up an appeal are imputable to the appellant, he will be allowed further time to correct such errors.

Neither of the foregoing errors or irregularities appears to be imputable to the appellant. In such a case the legislature has prohibited us from dismissing the appeal; but direct, that a reasonable time be granted to correct such errors or irregularity. Time is therefore granted until the next term of this court for this purpose.

**BELL TO USE OF M-MICKEN vs. MIX,  
ADMINISTRATOR, &c.**

**EASTERN DIS.  
March, 1841.**

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF WEST FELICIANA.

**BELL TO USE OF  
M-MICKEN  
vs.**

Where ample time is allowed to make the necessary party, on a suggestion of the death of the original defendant, and no steps are taken, the appeal will be dismissed.

This action was instituted against James H. Mix, as administrator of the succession of James Williams. There was judgment against the plaintiff, and an appeal granted the 23d, April, 1839.

At January term, 1840 on the suggestion of the plaintiff's attorney, the cause was continued to make the necessary parties in place of James H. Mix, who died since the appeal was taken.

Now at the February term, 1841, the defendant's counsel moved to dismiss the appeal, on the ground that no party appellees had been made, although ample time had been given.

*Thomas & Randall*, for the plaintiff and appellant.

*Boyle*, contra.

*Morphy, J.* delivered the opinion of the court.

At the January term of this court, in 1840, leave was given to the appellant to make necessary parties on a suggestion then made of the death of James H. Mix, and the cause was continued. Since then, no steps have been taken by the appellant to place his appeal in a situation to be tried in this court. A motion to dismiss is now pressed upon us: we think it must prevail, as the party has suffered more than twelve months to elapse without using any diligence whatever to prosecute this appeal.

Where ample time is allowed to make the necessary party on a suggestion of the death of the original defendant, and no steps are taken, the appeal will be dismissed.

Let it therefore be dismissed with costs.

EASTERN DIST.  
March, 1841.

**DIXON vs. KENNARD & SHIELDS.**

DIXON  
vs.  
KENNARD &  
SHIELDS.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF EAST BATON  
ROUGE, THE JUDGE THEREOF PRESIDING.

In this case there were two persons of the same name, but service of citation was made on the wrong one, and the suit discontinued as to him; the other could not be sued by a mere amendment to the petition and adding the word *junior*, without a new service of citation.

This is an action against John Kennard and Andrew Shields, as the endorers of a promissory note. There was judgment by default made final against Shields; but it appearing that there were two persons by the name of John Kennard residing in the parish, father and son, and that the wrong one was cited, the plaintiff's counsel discontinued the suit as to John Kennard.

He filed an amended petition, merely propounding interrogatories to John Kennard, junior; requiring him to look at the endorsement on the note and say if he did not endorse it, and that the endorsement was in his hand writing? The sheriff returned that he served a copy of this amended petition on John Kennard, junior, in person.

Kennard appeared by counsel, and excepted to the action, so far as it purported to be against him; because no petition and citation in said suit had ever been served on him. He averred that all the proceedings were null as to him and prayed that the suit be dismissed.

The plaintiff again amended his petition by adding the word *junior* after the name of John Kennard, but without any citation having issued.

Kennard, junior, renewed his exception and answered to the merits. The exception was overruled, and Kennard, junior, appealed.

*Brunot*, for the plaintiff, urged the affirmance of the judgment.

*Elam*, for the defendant, assigned errors apparent on the

face of the record; relying upon the irregularity of the proceedings and the want of service of petition and citation.

EASTERN Dis.  
March, 1841.

*Bullard, J.* delivered the opinion of the court.

DIXON  
VS.  
KENNARD &  
SHIELDS.

The appellant assigns for error apparent on the face of the record, that judgment was rendered against him without any legal citation and petition, and without any suit existing on the record of the district court, on which such a judgment could be predicated.

The facts appear to be, that suit was brought against John Kennard and one Shield's as endorers of a promissory note. That there was two persons in the parish by the name of John Kennard; father and son. Service was made upon John Kennard, the father; but as soon as it was discovered that he was not the real endorser, the suit was discontinued, and judgment signed to that effect, on the 5th February, 1838. Previously to the dismissal of the first petition, the plaintiff with leave of court amended his petition by putting interrogatories which were served on John Kennard, junior. Kennard, junior, then filed his exceptions which appear to form the basis of the present assignment of error, to wit: that although the plaintiff had discontinued his action as to Kennard, yet he had taken a judgment by default against him as John Kennard, junior, when no petition has ever been presented against him, nor has he ever been cited to answer the same; at the following term another amendment was made, adding the word junior, to the name of John Kennard, and the exception having been overruled an answer to the merits, was filed, and judgment having been rendered against John Kennard, junior, he appealed.

We think the assignment well taken. The suit was discontinued as against Kennard, and only one of that name was made a party. The service of citation was upon the father, and no citation appears ever to have issued addressed to the son. After the suit was discontinued a new suit could not be ingrafted upon the first petition by way of amendment,

In this case there were two persons of the same name, but service of citation was made on the wrong one, and the suit discontinued as to him: the other could not be sued by a mere amendment to the petition and adding the word junior, without a new service of citation.



EASTERN DIS. without citation. If, when it was discovered that service had  
March, 1841. been made on the wrong person, an alias citation had been  
GILLETT taken out and a new service made upon the real defendant,  
vs. the proceeding might have been regular. But we think the  
LANDIS ET AL. court erred in overruling the exception of the present  
appellant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided and reversed, and it is further ordered, that the exception of John Kennard, junior, be sustained, and that there be judgment in his favor, as in the case of a non-suit, with costs in both courts.

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**GILLETT vs. LANDIS ET AL.**

**APPEAL FROM THE COURT OF THE FIRST DISTRICT.**

There is no particular form required in giving notice of the transfer of a debt.

It is sufficient if knowledge of the transfer is brought home to the debtor and that he knew his former creditor was divested of his rights to the debt assigned, and that such knowledge of the fact was derived from the transferee or his agent.

The record of a suit in admiralty will be received in evidence to show the fact of insolvency of an individual, in a suit in which he is no party, when it is only required to prove *res ipsas*, and to show how certain funds were distributed.

The holder of notes, transferred to a third person, giving them up to the transferor improperly, will be liable to the transferee only for their *value* at the *time of the transfer*.

This is an action to recover \$3750, the amount of three promissory notes signed by George R. Wright and payable to the order of Wm. T. Joyce in four, eight and twelve months from the 8th April, 1837, which the plaintiff alleges were placed in

the hands of the defendants for collection by the payee. That EASTERN DIS.  
March, 1841. shortly before the first of said notes became due, Joyce, the payee, placed the defendants' receipt for the notes, endorsed and assigned over to him, in his hands, together with a written agreement or transfer, directing the defendants to hand over the notes or their proceeds; and that he by his agent immediately presented the receipt and agreement, and demanded the delivery of the notes which was refused.

The plaintiff further shows that had the notes been given up in pursuance of said transfer when demanded, he could have realized their amount; and that by refusing to deliver them the defendants have made themselves liable to pay him the entire amount, for which he prays judgment.

The defendants pleaded a general denial.

Upon these pleadings and issues, the cause was tried.

The plaintiff offered in evidence the receipt and a transfer of the original owner of the notes endorsed on it, together with a written agreement between the transferror and transferee showing the consideration and causes of the transfer. The plaintiff's agent declared that he called on the defendant, Landis, for the notes, who told him that they were deposited in bank and that the first one would be due in three or four days, and he had no doubt would be protested, and then he would hand them all over. That shortly afterwards, Landis told witness that Joyce, the transferror, had directed him not to give up the notes. Evidence was then offered to show the insolvency of the maker of the notes at the time of the transfer, to the introduction of which several bills of exceptions were taken. They are fully examined in the opinion of the court.

There was judgment for the defendants and the plaintiff appealed.

*Carter*, for the plaintiff:

The case was decided by the district judge on a simple question of fact, viz: that no notice of the transfer of the notes had been given to the defendants. An examination of the testi-

EASTERN DIS. mony will clearly demonstrate to this court that the judge a  
March, 1841.

GILLETT  
VS.  
LANDIS ET AL.

*quo* erred in the conclusion he arrived at; full notice was given to the defendants of the transfer.

*Upton*, on same side.

*Benjamin*, contra.

*Simon, J.* delivered the opinion of the court.

Plaintiff sues for the recovery of the sum of \$3750, which he alleges to be the amount of three notes of hand which were transferred to him by one W. T. Joyce, in July, 1837. He represents that the said three notes, each amounting to \$1250, dated the 8th of April, 1837, payable four, eight and twelve months after date, and drawn by G. R. Wright to the order of the said Joyce, had been placed by Joyce in the hands of the defendants for collection, and that in consequence of the transfer, defendants' receipt for said notes together with a written order to hand them over or the proceeds thereof to the plaintiff, was delivered to said plaintiff, who, before the maturity of said notes, called on the defendants and presented to them the said receipt and order. He further states that he exhibited to the defendants the proof of the assignment and sale of said notes in due time, but that said defendants refused to deliver up said notes, whereby said plaintiff has been prevented to realize the said sum of \$3750, for which he prays judgment against the defendants *in solido*. Said defendants pleaded the general issue, and the District Court being of opinion that the assignment or transfer of the notes in question had not been notified or communicated by the plaintiff to the defendants, gave judgment in favor of the latter; from which judgment the plaintiff appealed.

The evidence shows that the defendants' receipt and Joyce's written order were presented to said defendants by plaintiff's agent a few days before the first note became due (8th of August, 1837); that Landis remarked that the notes were deposited in

bank for collection ; that he had no doubt the first one would be protested ; and that then, he would hand them all over to said agent ; it is also shown that the assignment was presented to the defendants between the 2d and 7th of August, 1837, and that on the 15th of the same month, the three notes were delivered back by defendants to Joyce, who gave them a receipt accordingly.

With this evidence before him, we are at a loss to conceive how the judge *a quo* could come to the conclusion that the assignment had not been notified or communicated to the defendants. The testimony leaves no doubt in our mind, that when said defendants delivered back the notes to Joyce and took his receipt, instead of requiring the production of their own receipt, they had previously been apprized of the transfer of the notes to the plaintiff, and that they knew that their said receipt was in the hands of the said plaintiff. We are not aware that any particular form is required in giving notice of a transfer; the principal object of the law appears to be to prevent an improper payment after the debt has been transferred, and to protect and secure the rights of the transferee ; it matters not in what manner knowledge of the transfer is brought home to the debtor, provided it be clearly shown that he knew that his former creditor was divested of all his rights to the debt assigned, and that such knowledge of the fact was derived from the transferee or from his agent ; 12 *Martin*, 702 ; 1st *Martin*, N. S., 425 ; 6 *idem*, 286.

Under this view of the question, we think that the defendants ought not to have delivered the notes to Joyce ; that they did so at their peril, and that they are therefore bound to make good to the plaintiff the loss which he may have sustained from not having had in his possession at the time they became due, the three notes which he had a right to claim of said defendants by virtue of the transfer.

It is, however, contended by the appellees that this action being one in the nature of a claim for damages, the right of

EASTERN DIS.  
March, 1841.

GILLET  
VS.  
LANDIS ET AL.

There is no particular form required in giving notice of the transfer of the debt. It is sufficient if knowledge of the transfer is brought home to the debtor and that he knew his former creditor was divested of his rights to the debt assigned, and that such knowledge of the fact was derived from the transferee or his agent.

EASTERN DIS. recovery cannot be extended beyond the amount of the loss  
March, 1841. actually and really sustained by the plaintiff; that the notes  
GILLETT were good for nothing, there being no other security for their  
vs. payment but the personal responsibility of the drawer who was  
LANDIS ET AL. in insolvent circumstances; and they have attempted to prove  
 these facts by oral testimony, by the record of the suit of  
 Wright against his creditors, and by the production of a suit in  
 admiralty in the District Court of the United States, showing  
 how the proceeds of the sale of a certain steamboat mortgaged  
 to secure the amount of the notes in question, had been dis-  
 posed of; which last document was rejected by the lower  
 court.

The record contains a bill of exceptions taken to the opinion  
 of the judge *a quo* rejecting the suit in admiralty, on the  
 ground that it was *res inter alios acta*, and that the plaintiff  
 could not be affected thereby. It had been offered to prove *res*  
*ipsas*, and for such other purposes as to show that a claim had  
 been filed in said suit, wherein Joyce as holder of the three  
 notes had claimed to have said notes paid in preference out of  
 the proceeds of the sale of the boat, but that said proceeds were

The record of a suit in admiralty will be received in evidence to show the fact of insolvency of an individual, in a suit in which he is no party, when it is only required to prove *res ipsas* and to show how certain funds were distributed.

not sufficient to pay the privileges of higher rank than the mortgage, &c. We think the district judge erred in not admitting in evidence the record of the said suit in admiralty. It was not only good to prove *res ipsas*, but also to show in what manner the boat had been sold and its proceeds disposed of; particularly as Joyce himself, the plaintiff's transferrer, is said to have been a party to the suit, and for ought it appears, it may have been before transferring the debt to the plaintiff.

The objections may perhaps go to the effect of the evidence, but we can see no good reason why, in a case of this nature, the defendants should not have the benefit of the facts which can be disclosed by the production of the record of the admiralty suit.

The parol evidence, so far as it has been adduced, appears somewhat contradictory; but coupled with the fact that the

drawer of the notes in question was insolvent, it affords a certain presumption that said notes had not, at the time of the notice of transfer, the value which they purport to have on their face. All that the plaintiff can require is to be placed in the same situation in which he would have been if the notes had been delivered up to him by the defendants, at the time he made his application; and as said defendants cannot in justice be made liable beyond the real value of the notes at that time, and as this case must be remanded for the purpose of affording said defendants an opportunity of introducing the record of the suit in admiralty in evidence; we think this question of fact is a proper one to be submitted to a jury, who, in a matter like this, are perhaps the proper and competent judges to ascertain the real amount of the loss or damages sustained by the plaintiff.

EASTERN DIST.  
March, 1841.

GILLET  
VS.  
LANDIS ET AL.

The holder of notes, transferred to a third person, giving them up to the transferee improperly, will be liable to the transferor only for their value at the time of the transfer.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court, be annulled, avoided and reversed; and that this case be remanded to the court below for the purpose of assessing the amount of damages sustained, with instructions to the judge *a quo* to receive in evidence the record of the suit in admiralty; the costs of this appeal to be borne by the defendants and appellees.



EASTERN Dis.  
March, 1841.

COOPER vs. HODGE ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

COOPER  
vs.  
HODGE ET AL.

When the law abolishing imprisonment for debt and with it the writ of *capias ad satisfaciendum*, was promulgated, every proceeding begun but not perfected under these writs, became null and at an end.

So, when this act took effect a *capias* then in the hands of the sheriff became a nullity, and the bail was thereby instantly discharged.

This comes up under a proceeding against the surety in a bail bond.

The defendant, M. Hunt, had been arrested and held to bail. Judgment was rendered against him upon which a *feri facias* issued and was returned no property found; a *capias ad satisfaciendum* had also issued and returned not found; but before the return day of the writ had expired, the law abolishing imprisonment for debt went into operation, which also abolishes the *capias*.

The plaintiff now took a rule on the bail to show cause why he should not be made responsible for the amount of the judgment as the condition of the bail bond was forfeited by not producing the defendant.

The bail denied his liability. There was judgment on the rule in his favor and the plaintiff appealed.

*Elmore and King*, for the plaintiff and appellant.

1. The evidence in this case is sufficient. The neglect or refusal of the bail to surrender the principal in execution of the definitive judgment, is *prima facie* evidence, that the principal had departed from the state and the bail consequently liable. *Hudson vs. Perry et al.*, 8 La. Rep. 124.

2. No case has gone further in settling principles favorable to the bail than the case of *Burs vs. Houghton*, 9 Peters 331. In that case it is settled, that when the principal would be entitled to an immediate discharge upon being surrendered,—the bail will be discharged without a surrender." From this

the inference is plain, that if the principal would not be entitled to an *immediate* discharge upon being surrendered,—the bail is bound to surrender him or in default thereof to be liable to pay the debt. The law of 1840, for the abolishment of imprisonment for debt, would not discharge the principal upon his being surrendered ; on the contrary he would be imprisoned for three months. Sec. 4th of the law.

EASTERN DIS.  
March, 1841.

COOPER  
VS.  
HODGE ET AL.

3. The right of the bail to obtain a discharge by a surrender of the principal granted in articles 231, 3 and 4 of the Code of Practice, has not been abrogated by the law of 1840, abolishing imprisonment for debt.

4. The obligation of the bail, was not to pay upon the unsuccessful issuance and return non est in ventus, of a *ca. sa.* ; but to present the body of the debtor in execution of definitive judgment or to become responsible for him, Code Pr. 235.

5. "Execution of definitive judgment," simply means the exhaustion of all legal remedies for the enforcement of judgments. The question in this case then is confined to the simple inquiry, has the plaintiff executed the definitive judgment obtained by him against the principal ; if so, has the bail presented the body of the debtor ? The record in this case shows that the plaintiff has exhausted all legal remedies for the recovery of his debt in vain ; and that the bail has not complied with his obligation. He is therefore liable.

Section 19th of the law of 1841, creating additional sheriffs in the parish of Orleans—(if it does not entirely repeal the law of 1840, so far as it can effect this case—) is at least a legislative construction of that law ;—and as such is entitled to great consideration with the court.

*L. Pierce*, contra.

*Martin, J.* delivered the opinion of the court.

The plaintiff is appellant from a judgment discharging a rule which he had obtained in order to render the defendant liable as the bail of M. Hunt against whom the plaintiff had

EASTERN Dis. obtained judgment, and caused to be issued writs of fieri facias  
March, 1841. and capias ad satisfaciendum on which the sheriff returned

COOPER

VS.

HODGE ET AL.

*nulla bona and non est inventus.*

The appellee's counsel has contended that his client was released from any obligation resulting from the bail bond, by the act abolishing imprisonment for debt, approved the 28th March, 1840, and promulgated the 16th April, following. The capias was issued the 30th March, 1840, returnable the first Monday of May following, and returned on the 13th of that month.

The judge *a quo*, was of opinion that on the repeal of a law every proceeding begun but not perfected under it, becomes absolutely void. In this opinion we concur. We have held that if judgment be correctly given under a law which is repealed *pending* the appeal, this court is bound to reverse it. *State vs. Johnson et al.* 12 La. Reports, 547. 13 Idem, 497.

When the law abolishing imprisonment for debt and with it the writ of capias ad satisfaciendum, was promulgated, every proceeding begun but not perfected under these writs, became null and at an end.

So, when this act took effect *a capias* then in the hands of the sheriff became a nullity and the bail, was thereby instantly discharged.

The act abolishing imprisonment for debt above referred to, repealed the articles 729, 730 and 731, of the Code of Practice, which authorizes the issuing and consequently the execution of the capias ad satisfaciendum. The delivery of a defendant to his bail is for the sole purpose, that the latter may keep him, in order, that he be forthcoming after judgment shall have been obtained, if the plaintiff see fit to have him confined until judgment be satisfied, or he be otherwise discharged in due course of law. This imprisonment being now forbidden by law there can be no object in the detention of the defendant, by the bail. *Lex neminem cogit ad vana.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the commercial court, be affirmed, with costs.

## PEYROUX ET AL, vs. DAVIS.

EASTERN Dis.  
March, 1841.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

PEYROUX ET AL.  
vs.  
DAVIS.

It is no bar to a suit in one of the State courts of Louisiana, or cause to deprive it of its jurisdiction, that a suit may have been commenced in another state or country between the same parties for the same cause of action. It would be otherwise if brought before two tribunals of concurrent jurisdiction within the state.

Evidence will not be admitted on a simple allegation that the plaintiff is not the owner of the instrument sued on. The defendant must aver that he has a good defence against the real owner; otherwise whether the plaintiff is owner or not, cannot avail him.

A *delay* in giving notice to an endorser, occasioned by the irregularities of the post office through which it was transmitted, will not injure the plaintiff's right to recover.

A notary will not be permitted to alter his record of the protest and notice to endorsers, by interlining and inserting the manner or circumstances of giving notice, which he or his clerk may have omitted.

This is an action against the endorser of a promissory note signed by C. J. Phillips, payable to the order of and endorsed by the defendant. It is dated at New Carthage, May 1st, 1836, and payable twelve months after date, at the Bank of Orleans, in the City of New-Orleans.

The defendant excepted, that suit was pending between the same parties on this note in the Circuit Court of the United States for the State of Mississippi. For answer, he pleads the general issue; and specially that the plaintiffs are not the owners of the note sued upon. On the trial, the defendant endeavored to show that he had not been legally notified of the protest and non-payment of the note; that no regular demand and notice of protest was given.

A mass of testimony was taken in the case to establish the demand, and also to sustain the defence. On a full examination of the whole case, the Judge of the Commercial Court gave judgment for the amount of the note sued on. The defendant appealed. The material parts of the testimony and grounds of defence are fully stated in the opinion of the court.

EASTERN DIS.  
March, 1841.

PETROUX ET AL.  
vs.  
DAVIS.

*L. Janin*, for the plaintiffs.

*Preston*, for the defendant and appellant.

*Morphy J.* delivered the opinion of the court.

This is an appeal from a judgment against the payee and endorser of a note drawn by one Cornelius J. Phillips, at New Carthage, in the Parish of Madison, and made payable at the Bank of Orleans in this city.

The appellant urges that the court erred in overruling his plea in abatement on account of the pendency of a suit against him for the same cause of action in the United States Circuit Court at Jackson, in the State of Mississippi: The question presented by this plea can hardly be considered as open in this court; 6 Martin N. S. 517. *Stone vs. Vincent*, 4 La. Rep. 158. *Godfrey vs. Hall*, 5 Idem 424. *West's syndics vs. McConnell*. But it is said that when these decisions were made, the attention of the court was not called, nor

It is no bar to a suit in one of the State Courts of Louisiana, or cause to deprive it of its jurisdiction, that a suit may have been commenced in another state or country between the same parties for the same cause of action. It would be otherwise if brought before two tribunals of concurrent jurisdiction with in the state.

was any reference made to articles 99 and 335 of the Code of Practice which are considered as decisive by appellant's counsel. As these decisions are all posterior to the promulgation of the Code of Practice, it is reasonable to presume that the provisions of law to which we are referred would not have been passed *sub silentio* had they been thought to have such a direct bearing upon this point. This court no doubt was then of opinion, as we are now, that the Code of Practice contemplates only suits brought before two tribunals of concurrent jurisdiction within our own state, but does not deprive the courts of this state of their jurisdiction in a cause brought before them, because a suit may have been commenced in another state or country between the same parties and for the same cause of action. The rule in the English courts is that the pendency of a suit in a foreign country by the same plaintiff against the same defendant for the same cause of action, is no stay or bar to a suit instituted in one of their courts. This

rule has been followed in this and other states we believe, as EASTERN DIS. March, 1841. to suits instituted in the courts of our sister states; although the states of this union are not to be viewed in the light of PETROUX ET AL. vs. DAVIS. foreign countries by each other, yet they are independant sovereignties and distribute justice within their limits according to their own laws and regulations, and without regard to judicial proceedings had elsewhere in a suit between the same parties, unless they have not been followed by a definitive judgment on the merits. Our courts have no greater connection or interference with the Court of the United States for the ninth Circuit and District of Mississippi than they have with any of the other state courts. The same rule should therefore govern and jurisdiction was we think, properly retained in this case; Bowne and Seymour vs. Joy; 9 Johnson's Rep. 221.

Our attention has been drawn to a bill of exceptions to the opinion of the Judge below sustaining an objection to the question whether plaintiffs were the owners of the note in suit. The testimony was rightly excluded. It is now too well settled to be again questioned that on a simple allegation that the plaintiff is not the owner of the instrument sued on, such inquiries cannot be gone into. The defendant must aver (which he has not done here,) that he has a good defence against the real owner, otherwise whether the plaintiff is the owner or not is a fact which cannot avail him; 3 Martin N. S. 291; Banks vs. Eastin, Ibid. 392; Shaw et al. vs. Thompson; 14 L. 448, Abot vs. Wiltz.

The point most strenuously insisted upon is the want of proper notice to defendant; it appears from the evidence that the notary not knowing, and not being able to ascertain defendant's domicile put a notice of protest in the post office of this city, on the evening of the 4th of May, 1837, the day he protested; this letter was directed to New Carthage, the place where the note was drawn; independant of this, he delivered another notice for defendant to the plaintiffs; the latter un-

Evidence will not be admitted on a simple allegation that the plaintiff is not the owner of the instrument sued on. The defendant must aver that he has a good defence against the real owner; otherwise whether the plaintiff is the owner or not, cannot avail him.



EASTERN Dis. derstanding that defendant lived somewhere in Mississippi,  
March, 1841. sent it on the following day to Saml. T. McAlister their cor-

PEYROUX ET AL.

VS.  
DAVIS.

respondent at Natchez, with a request to direct it to defendant. McAlister testifies positively that he received this notice on the 7th of May, and on the same day forwarded it through the Natchez post office to Warrenton in Mississippi, the nearest post office to defendant's domicil in that state, and that to which his letters are usually directed; he does not state whether he received the notice by the mail or by a steamboat, but the evidence renders it very probable that it was in the latter way. The notice was received by defendant, and he has himself given it in evidence for the purpose of showing that it bears the stamp of the Natchez post office of the 12th May; from the discrepancy in the dates between the testimony of McAlister and the post-mark, the appellant's counsel contends that through the neglect of the agent of plaintiffs in Natchez the notice was mailed only on the 11th of May, and did not reach defendant as soon as it would have done, had it been put in the post office of New-Orleans. Samuel T. McAlister's testimony is corroborated by that of his clerk and brother William McAlister, who is equally positive that the notice to defendant was received in Natchez on the 7th of May, and forwarded to him at Warrenton on the same day; and also by a letter to plaintiffs written by himself on the 12th May, giving them an account of what he had done on the 7th in relation to the notices sent to him. As to the manner in which the post office at Natchez was managed, the testimony is very contradictory, some witnesses attesting the regularity with which the business in the office was conducted, while others speak of the notorious confusion and carelessness prevailing in it on account of the Post-master and his chief clerk being engaged in pursuits incompatible with a proper and regular discharge of their duties; and they mention instances of letters addressed to persons at a distance having been swept out of the office and found before the door. Upon the

whole we incline, with the Judge below, to ascribe the discrepancy in the evidence to a careless detention of the notice in the post office, rather than to discredit the otherwise unimpeached testimony of the two McAlisters; corroborated as it is by the letter written to plaintiffs a few days after the occurrence. If any delay has resulted from the course pursued under the circumstances of this case, we are not prepared to say that it should injure plaintiffs' right to recover; Bailey on bills p. 270, 280 and 287. But should there be any doubt as to the notice being in time, by reason of plaintiffs sending it by a steam-boat and not by mail from New-Orleans, we think that they are entitled to the benefit of the constructive notice created for cases of this kind by the 3d. section of the statute of 1827, (1 Moreau's Digest 99.) Were a compliance with the requirements of this law attempted to be shown only by the official certificate of the notary who made the protest, it could not have availed plaintiffs. The evidence discloses that the most material circumstances which should have been mentioned in the entry on his books to be attested by him in the presence of two witnesses had been omitted therein at the time of the protest, but that several months after having discovered these omissions, the notary made an interlineation in the original record, inserting the circumstances which his clerk had left out; this, he says was done by him because he had a distinct recollection of those circumstances and thought it his duty to conform the entry to the true state of the fact. We cannot countenance such an act. It destroys in our opinion the authenticity of the deed, and consequently its admissibility as evidence under the statute. It would be dangerous indeed to permit a notary even with the best intentions to supply any omissions in a deed passed before him; when it is completed, he has no right whatever to amend or change it. The statute which requires that the official certificate of the notary shall be received as proof of the facts mentioned in it cannot be too strictly construed, for it introduces a new mode of proof at

EASTERN DIS.  
March, 1841.

PEYROUX ET AL.  
vs.  
DAVIS.

A delay in giving notice to an endorser, occasioned by the irregularities of the post office through which it was transmitted will not injure the plaintiff's right to recover.

A notary will not be permitted to alter his record of the protest and notice to endorse, by interlining and inserting the manner or circumstances of giving notice, which he or his clerk may have omitted.

EASTERN DIS war with the ordinary rules of evidence. But this court has  
March, 1841. repeatedly decided that the written proof provided for by this

PETREUX ET AL.  
vs.  
DAVIS.

statute does not exclude parol evidence of the notice of protest; 7 La. Rep., 7; 8 Idem 170; 11 Idem 566. The notary was examined as a witness. He states distinctly and positively that he demanded payment of the note at the Bank of Orleans; and that after fruitless enquiries at the counting house of the holders about the defendant's residence, he made out two notices for defendant, one of which he put in the post office of this city, addressed to New Carthage, and the other he handed over to the plaintiffs; the clerk of the latter testifies also as to the enquiries made in relation to defendant's domicile. This shows in our opinion, a sufficient degree of diligence and authorized the putting of the notice into the post office addressed to defendant at the place where the note purported to have been drawn. 1 Moreau's Digest p. 99, sec. 3. Bailey on bills, 280. 7 La. Rep. 7, Preston vs. Daysson. It might not be unnecessary to add that the testimony shows that there is a post office at New Carthage, almost within sight of defendant's residence; being only at a distance of about three miles from it, while the nearest post office on the Mississippi side is about fifteen miles from defendant's house.

It is therefore ordered that the judgment of the Commercial Court be affirmed with cost.

STATE *vs.* McDONALD ET AL.EASTERN DIS.  
March, 1841.APPEAL FROM THE COURT OF THE FOURTH DISTRICT, FOR THE PARISH OF  
IBERVILLE, THE JUDGE THEREOF PRESIDING.STATE  
*vs.*  
McDONALD ET AL

The law expressly requires that all final judgments shall be signed before execution can issue. It is not enough, for the judge merely to sign the minutes of the proceedings of the court.

This case comes up on an injunction. The State obtained a judgment against the defendant and his surety, in a recognizance or bail bond for the sum of \$1000. The judgment had never been signed; *only* the minutes of the proceedings of the court at the close of the term. Execution issued on this judgment and the sheriff was proceeding to make the money by a seizure and sale of the defendants' property. They applied for and obtained an injunction on the ground, mainly, that the judgment against them was not executory, having never been signed, according to law.

On hearing the case on the injunction, the district judge decided that in the country the practice was for the judge to sign the minutes of the proceedings of the court at the close of term; that this was a sufficient signing in the view of the law. There was judgment dissolving the injunction and the defendants appealed.

*Roselius*, Attorney General, for the State.

*G. B. Taylor*, for the defendants.

*Martin, J.* delivered the opinion of the court.

The defendants are appellants from a judgment dissolving an injunction which they had obtained to prevent the execution of a writ of *feri facias*, which had issued on a judgment before it had been made final by the signature of the judge.

The judgment was not signed, but the district court decided that the signature of the judge to a judgment is not essential to its maturity in the country, where, the judge *a quo* informs

**EASTERN DIS.**  
**March, 1841.**

**STATE**  
**vs.**  
**JUDGE OF PRO-**  
**BATES FOR THE**  
**CITY OF NEW**  
**ORLEANS.**

The law ex-  
pressly requires  
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ings of the court.

us, it is the practice for the judge to sign the minutes on the last day of the term; all the judgments being entered thereon.

The court, in our opinion, erred. The Code of Practice expressly requires the signature of the judge to all final judgments; art. 546. He is first required to render his judgments in open court, and three days thereafter to sign them. His

attention is called to them after the three days are allowed to him for reflection, and if no application is made for a new trial, he is to sign them. The law is absolutely silent as to the signature of the minutes by the judge on the rising of the court. It is, however, a prudent measure; but it cannot relieve the judge from the obligation imposed on him by law, to recur to his judgments three days after their rendition, and to make them final by affixing his signature thereto.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed; and that the injunction be re-instated and perpetuated.

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**STATE vs. JUDGE OF PROBATES FOR THE CITY OF  
NEW ORLEANS.**

**AN APPLICATION FOR A MANDAMUS.**

Where a copy of a foreign will is presented to the Judge of Probates in this State, together with authentic evidence of its having been duly proved and ordered to be executed in the country where it was received or made, it is the duty of the Judge to order the registry and execution of the will.

The registry and execution of a foreign will may be made, when the case requires it, without any appointment of administrator or dative testamentary executor.

Where one of several executors of a foreign will, duly proved and ordered to be executed, presents himself for letters testamentary under the will here, and the case is a proper one, he should be recognized and authorized to act by the Court of Probates, under its control and supervision.

The Judge of Probates is in no case authorized to appoint a dative testamentary executor, until the executor named by the will has had an opportunity to accept or refuse the trust.

EASTERN Dis.  
March, 1841.

STATE  
VS.

JUDGE OF PROBATES FOR THE  
CITY OF NEW  
ORLEANS.

This case comes up on an application for a mandamus, directing the Judge of Probates for the city and parish of New Orleans, to enregister and order the execution of a foreign will.

P. L. Sloan petitioned the Judge of Probates to enregister and make executory the last will and testament of Jane Sloan, deceased, late of Scotland, duly proved according to the laws of that country, and in which he is named one of the testamentary executors, accompanied by the powers of attorney from the other heirs, himself being one. He shows that there is property of the deceased within the jurisdiction of the court and prays that letters testamentary be granted to him.

The Probate Judge made an order at the foot of the petition stating that "being satisfied, the will of Jane Sloan, deceased, had been duly proved before a competent judge where said will was received; that the testatrix had appointed several testamentary executors, giving to *a quorum of them only*, the authority to execute the will; that with the exception of the petitioner, all the other executors are abroad; that there are absent heirs of the deceased: *Orders*, that the last will and testament of Jane Sloan, deceased, be registered; that the petitioner, Peter Lawrie Sloan, be and he is hereby appointed dative testamentary executor of the last will and testament of said Jane Sloan, deceased; and C. Roselius, Esq., Attorney and Counsellor at Law, be and he is hereby appointed Attorney to represent the absent heirs of said deceased."

The petitioner being dissatisfied with the above order, refusing letters testamentary as he had prayed for, applied to this court for a mandamus.



EASTERN DIS.  
March, 1841.

STATE  
VS.  
JUDGE OF PRO-  
BATES FOR THE  
CITY OF NEW  
ORLEANS.

A rule was taken on the Judge of Probates to show cause why a mandamus should not issue directing him to grant letters testamentary to said P. L. Sloan in the usual form and not as dative testamentary executor.

The Judge showed for cause :

I. That he has rendered an order on the petition of P. L. Sloan, which in his opinion is such as the justice of the case requires and as is necessary for the maintenance of his jurisdiction.

II. That as long as this order is unappealed from, the Supreme Court cannot maintain jurisdiction in the premises ; Constitution of Louisiana, art 4, section 2.

And for further answer, if any be necessary, this respondent says :

1. That P. L. Sloan cannot derive under the confirmation of this court the power to execute *alone* the will, the testatrix having confided this trust to a "*quorum*" of her several executors.

2. That the said P. L. Sloan cannot be considered as forming by himself this "*quorum*," even with the proxies of his foreign co-executors, because by so requiring a quorum of her executors, the testatrix wanted them to consult each other, in order that through their united action her estate be better administered.

3. That the law requires the dismissal of an executor who absents himself for a time exceeding the term of his administration, and *a fortiori* cannot be made to sanction the confirmation of an executor or executors whose actual and permanent domicile and residence are in a foreign country—for this reason the powers of foreign executors cannot be recognized by this court ; La. Code, 1149, No. 2 ; *idem*, 1014.

4. That this last rule prevails as to tutors, administrators, curators, &c. ; La. Code, 1013, 1014 ; *idem*, 351 ; C. Pr., 1037 ;

and cannot and ought not to be construed in a more favorable light as regards foreign administrators. EASTERN DIS.  
March, 1841.

5. That the very legitimate son in whose favor is the maxim, *le mort saisit le vif*, is prohibited by law, whilst *absent*, to administer in this State the very estate of his father, accepted by him under the benefit of inventory, unless his agent have a *special power to accept or reject this succession, &c.*, (La. Code, 1038) and unless said beneficiary heir gives security, &c. Idem, 1041. STATE  
ES.  
JUDGE OF PROB-  
ATES FOR THE  
CITY OF NEW  
ORLEANS.

6. That the Court of Probates would be without jurisdiction over the executors confirmed by it (C. Pr. 997) were they living and residing in foreign countries, they being without the reach of its mandates; mandates which are deemed necessary for the maintenance of the rights of our fellow citizens as creditors or heirs; C. Pr., 997 to 1012, etc.; whence follows the authority of this court to appoint a dative testamentary executor; C. Pr., 1037; La. Code, 1671.

7. It has become a general doctrine of law, recognized both in England and America, that no suit can be brought by or against any foreign executor in the courts of the country, in virtue of his foreign letters testamentary; and that new letters of administration must be taken out and new security given, according to the general rules of law prescribed in the country where the suit is brought. The authorities to this point are now exceedingly numerous and entirely conclusive; Story's Commentaries—conflict of laws, section 513 and notes.

8. That the new administration is made subservient to the rights of creditors, legatees and distributees resident within the country: and the residuum is transmissible to the foreign country only when the final account has been settled in the proper domestic tribunal upon the equitable principles adopted in its laws; same authority as above, section 513 and notes.

9. Persons domiciled and dying in foreign countries are often deeply indebted to creditors living in other countries, in which they have personal assets. In such cases it would be a great

**EASTERN DIS.**  
**March, 1841.**

**STATE**  
**VS.**  
**JUDGE OF PRO-**  
**BATES FOR THE**  
**CITY OF NEW**  
**ORLEANS.**

hardship upon such creditors to allow a foreign executor to withdraw those funds without the payment of such debts, and thus to leave these creditors to seek their remedy in the domicile of the foreign executor or administrator, and perhaps there, meet with obstructions and inequalities in the enforcement of their own rights from the peculiarities of the local laws; same author, section 512.

*Strawbridge*, for the petitioner, argued to show that the answer of the judge was insufficient, and that the prayer of the petitioner should be granted.

*Roselius*, contra.

*Bullard, J.* delivered the opinion of the court.

In this case a rule was taken on the judge of the court of probates for the city and parish of New-Orleans, to show cause why a mandamus should not issue commanding him to grant letters testamentary in the usual form to P. L. Sloan, one of the executors named in the last will and testament, of Jane Sloan, late of Scotland, demised, and not as dative executor. It appears that the will was made in Scotland, and had been there regularly admitted to probate and its execution ordered.

The answer of the judge to the rule covers a much broader ground than the rule itself; and all that part of it which concerns the authority of this court to proceed by mandamus, instead of appeal, may be passed over as presenting questions already settled by this court in the case of the *State vs. the same judge*: 14, La. Rep. 478.

Upon the sole question, which this case presents, to wit: the propriety of appointing a *dative executor*, instead of recognising the authority of one of those named by the will, the judge answers:

1st. That P. L. Sloan, cannot derive under the confirmation of this court the power to execute *alone* the will, the testatrix having confided this trust to a *quorum* of her several executors.

2d. That the said P. L. Sloan, cannot be considered as forming by himself this quorum, even with the proxies of his foreign co-executors, because by so requiring a *quorum* of her executors the testatrix wanted them to consult each other in order that through their united action her estate might be better administered.

EASTERN Dis,  
March, 1841.

STATE  
VS.  
JUDGE OF PRO-  
BATES FOR THE  
CITY OF NEW  
ORLEANS.

3rd. That the law requires the dismissal of an executor who absents himself for a time exceeding the term of his administration, and *a fortiori* cannot sanction the confirmation of an executor whose actual and permanent residence is in a foreign country; and the powers of foreign executors cannot be recognized by this court.

4th. That this last rule prevails as to administrators, curators, &c., and ought not to be construed in a more favorable light as regards foreign executors.

5th. That even an absent forced heir cannot administer while absent, the estate of his father accepted under benefit of inventory, unless by an agent who has a special power to accept or reject *successions*, and unless he gives security.

6th. That the court of probates would be without jurisdiction over executors, confirmed by them were they living and residing in foreign countries; and consequently beyond the reach of the mandates and have the authority of the court of probates to appoint a dative testamentary executor.

The other parts of the answer is an argument in support of the ground assumed by the judge upon general principles of the conflict of laws and growing out of public policy, and we are referred to Story's conflict of laws, 513 and notes.

If the petitioner had simply presented a copy of the will together with authentic evidence of its having been duly proved and ordered to be executed in the country where it had been received or made, it would have been the duty of the judge, in our opinion to order the registry and execution of the will according to articles 1681 and 1682 of the La. Code. Such an order is equivalent to a new probate in this State, which is

Where a copy of a foreign will is presented to the Judge of Probates in this State, together with authentic evidence of its having been duly proved and ordered to be executed in the country where it was received or made, it is the duty of the judge to order the registry and execution of the will.

**EASTERN DRS.** wholly independent of the question, whether letters testamentary shall issue and to whom. There may be cases in which no

**STATE**  
**VS.**  
**JUDGE OF PROBATES FOR THE CITY OF NEW ORLEANS.**

The registry and execution of a foreign will may be made, when the case requires it, without any appointment of administrator or dative testamentary executor.

administrator is required in the interest of creditors or legatees, and the registry of the will is asked merely to complete evidence of title to property held under the will. In such a case we cannot see the necessity or propriety of coupling with such order for registry the appointment of an executor not asked for, much less an attorney for absent heirs. If after the registry and order of execution, one of the persons appointed executor by the will comes forward and asks for letters testamentary, it will be necessary to enquire whether it is a proper case for the appointment of a dative executor. To this effect was the decision of this court in the matter of Ramsay's will; 13 La. Rep., 221.

Where one of several executors of a foreign will, duly proved and ordered to be executed, presents himself for letters testamentary under the will here and the case is a proper one, he should be recognized and authorized to act by the Court of Probates, under its control and supervision.

The question presents itself in this case, whether, when one of several executors appointed by a foreign will comes forward and asks for letters testamentary, it be proper to refuse his prayer on the ground that he alone is not authorized to act by the will, and whether it be a proper case for the appointment of a dative testamentary executor. The last part of this question seems to be sufficiently answered by the article 1671 of the Louisiana Code, which declares that if the testator has omitted to name a testamentary executor, or if the one named refuses to accept the judge shall appoint one *ex officio*. We have no hesitation in saying that in our opinion, the Court of Probates has no authority to appoint a dative testamentary executor, until the executor named by the will has had an opportunity offered him to accept or refuse the trust. If he accepts,

• The Judge of Probates is in no case authorized to appoint a dative testamentary executor, until the executor named by the will has had an opportunity to accept or refuse the trust. he is bound to administer under the supervision of the Court of Probates, to comply with the laws of Louisiana in relation to the payment of debts and legacies, and to render his account to the court by whom his authority has been confirmed. One of the executors appointed by the will of Mrs. Sloan asks for letters testamentary, and the judge gives another reason for not granting his prayer, to wit: that he alone is not authorized by

the will to act without consulting his co-executors, of whom a quorum is to govern. The will is not before us, but admitting such to be its construction, it does not follow that when one of the executors comes forward and signifies his willingness to accept the trust confided to him by the testatrix, he is to be repelled on the ground that he alone is not authorized to administer, and that the court has at once a right to appoint a dative executor. *Non constat* but that the other executors or a majority of them, will also come forward and accept the trust; and when, it is ascertained that they do not, it will be time enough to enquire whether one of the executors may not alone administer under the guidance and control of the Court of Probates. In the meantime, we think, he ought to be recognized as executor. It does not appear whether the executors have the seizin of the estate by the will; if not, the heirs are entitled at once to take the estate into their hands on furnishing a sufficient sum to pay debts and legacies.

Upon the whole, we conclude, that the court erred in appointing a dative executor and an attorney of absent heirs, before the necessity of such an appointment was shown; and we are of opinion that the court ought to have recognized the petitioner as one of the executors appointed by the will of the testator, and to have granted him letters testamentary as such.

The appointments of dative executor and attorney for absent heirs are therefore annulled, and it is further ordered that the rule be made absolute, and that the Court of Probates recognize P. L. Sloan and grant him letters testamentary, as one of the executors appointed by the will of Jane Sloan, deceased, upon his complying with the requisites of law.

EASTERN DIS.  
March, 1841.

STATE  
VS.  
JUDGE OF PROBATES FOR THE  
CITY OF NEW  
ORLEANS.



EASTERN Dis.  
March, 1841.

**BOURGOIS vs. BOURGOIS ET AL.**

BOURGOIS  
vs.  
BOURGOIS ET  
AL.

APPEAL FROM THE COURT OF THE SECOND DISTRICT, FOR THE PARISH OF  
ST. JAMES, THE JUDGE OF THE FOURTH PRESIDING.

An appraisal of the identical property, claimed together with a receipt on the back of the *fieri facias*, by the plaintiff that she had received the amount of sale of the property seized by becoming the purchaser, is insufficient evidence of title to it, when the sheriff's deed is not produced, and there is no other evidence of an adjudication.

This suit commenced by an injunction. The plaintiff, wife of Honoré Champagne, had obtained a judgment of separation of property from her husband in the sum of \$4,304 00, which was executed in part by seizing and selling certain slaves of her husband which she purchased in at sheriff's sale, in part satisfaction of her said judgment, and for which she alleged she had the sheriff's deed of sale.

She further shows that these very slaves have been seized by the sheriff under an execution in favor of the defendant, against her husband Honoré Champagne, for a debt due by him, and that the sheriff is proceeding to sell said property. She prays for a writ of injunction to issue, enjoining and prohibiting the defendant and the sheriff from proceeding therein; that it be made perpetual, with 300 dollars damages, and that said slaves be decreed to be her property.

The defendants pleaded the general issue, and averred that the judgment set up by the plaintiff against her husband was obtained through fraud and collusion, and is null and void; and that she be held to strict and legal proof of her title to said slaves. They pray that the injunction be dissolved with damages.

Upon these pleadings and issues the case was tried before the court and a jury.

The plaintiff failed to show the sheriff's deed of sale, or any copy thereof. She produced in evidence her judgment, a *fieri facias* and an *alias* which had issued thereon; and also a receipt endorsed on the latter, that she had received up-

wards of 2000 dollars, and was the sole purchaser of the property seized and sold under it. There was no evidence of the *adjudication* of the slaves in question to the plaintiff. She showed that these very slaves, however, were seized under the execution which had issued on her judgment; and also their appraisement before sale.

On this evidence the jury returned a verdict for the plaintiff, upon which there was judgment perpetuating the injunction, from which the defendant, Bourgeois, appealed.

*Miles Taylor*, for the plaintiff and appellee.

*Beatty*, for the defendant and appellant.

*Morphy, J.* delivered the opinion of the court.

The plaintiff enjoined the execution of a writ of fieri facias, under which certain slaves had been seized as the property of her husband, Honoré Champagne, at the suit of defendant a judgment creditor. She alleges that on the 24th of March, 1835, she was separated of property from her husband, and obtained against him a judgment for \$4,304 06; that to satisfy this judgment the slaves in question were seized and sold on the 12th of June, 1837, when she became the purchaser and absolute owner of them; that the original act of sale by the sheriff to her has been lost or mislaid, but that she will produce a copy of the same. She prays that the sheriff be decreed to pay her \$300 damages, that Louis Bourgeois, the seizing creditor be made a party to the suit and that the slaves be decreed to be her property. The defendants after denying the facts and allegations of the petition aver that if there has ever been any judgment obtained by plaintiff as alleged, the same was procured by fraud and collusion between her and her husband upon insufficient and illegal testimony, and that the same is not binding either between the parties or against third persons. They pray that plaintiff be ruled to prove in a summary manner the allegations of her petition, and that in

EASTERN DIS.  
March, 1841.

BOURGEOIS  
vs.  
BOURGEOIS ET  
AL.


EASTERN DIS.  
March, 1841.

BOURGEOIS  
VS.  
BOURGEOIS ET  
AL.

default thereof the injunction may be dissolved and set aside, and damages awarded against her and her sureties on the injunction bond, according to the act of 1831. The case was tried by a jury who gave their verdict for plaintiff, whereupon a judgment was entered perpetuating the injunction. Louis Bourgeois appealed.

On the trial, plaintiff could produce neither the original nor a copy of the sheriff's sale alleged to have been made to her. The record shows however a judgment in her favor for \$4,304 06, followed by a fi. fa. and alias fi. fa.; and an appraisement of the very slaves seized in this suit, made on the 12th of June, 1837, in presence of A. Lawson, sheriff. A receipt is endorsed on the last execution in the following words and figures, to wit:

"Received of A. Lawson, as sheriff of the parish of Lafourche Interior, two thousand eight hundred and thirty two dollars, being the full amount of sale of property seized and sold under the within execution, and of which I became the sole purchaser this 13th June, 1837.

her  
"Marie Magdelaine  Bourgeois."  
mark.

"Jean Bte. Bernard,"  
"Neuville Champagne."

It is said that a sale to plaintiff of these slaves must be inferred from the appraisement and this receipt endorsed on the execution; this we are by no means prepared to do. Had an adjudication taken place, we are bound to presume that the sheriff would have made his return in due form, and moreover would have caused his deed of sale to be recorded in the clerk's office. In the absence of either of these, we can recognize no title whatever in plaintiff; the appraisement is one of the formalities which precede the sheriff's sale; an adjudication might or might not have followed. As to the receipt it contains no description whatever of the property mentioned

as having been bought by plaintiff; being moreover under private signature, nothing shows at what time it was written; but admitting it to have been made out as it purports to be on 13th of June, 1837, it creates at most but a presumption which cannot supply the want of the sheriff's return which is the only legal evidence of his official acts; had such a return been produced showing an adjudication to plaintiff, it might perhaps have sufficed; for the Code of Practice has provided that the property sold on execution passes to the last bidder by the adjudication, and that the deed adds no force or effect to the adjudication; articles 690 and 695. We must add that the presumption of title in plaintiff said to result from this receipt, already insufficient in itself, is not strengthened by the circumstance disclosed by the evidence, that after this pretended sale the slaves continued in the possession and under the absolute control of Honoré Champagne, who hired them out in his own name, receipted for their hire, &c., up to the time they were seized in this suit. Plaintiff having thus failed to show these slaves to be her property, it is unnecessary to examine into the validity of her claims against her husband, for admitting them to be fully proved by the evidence they would have furnished no good ground to suspend the execution of the *fieri facias* issued against him. When the property seized shall have been sold, she will have an opportunity of enforcing her right of preference on the proceeds contradictorily with the seizing creditor; C. of Pr. art. 300. The injunction in our opinion ought to have been dissolved, and it is our duty to give such judgment as should have been rendered below, but the sureties on the injunction bond not being before us, no judgment can be pronounced against them.

It is therefore ordered that the judgment of the District Court be avoided and reversed, and it is further ordered and decreed that the injunction be dissolved, and that the defendant do recover of plaintiff ten per cent. as damages on the

EASTERN DIS.  
March, 1841.

BOURGEOIS  
VS.  
BOURGEOIS ET  
AL.

An appraisal-  
ment of the  
identical pro-  
perty, claimed  
together with a  
receipt on the  
back of the fieri  
facias, by the  
plaintiff that she  
had received  
the amount of  
sale of the pro-  
perty seized by  
becoming the  
purchaser, is  
insufficient evi-  
dence of title to  
it, when the  
sheriff's deed is  
not produced,  
and there is no  
other evidence  
of an adjudica-  
tion.

EASTERN Dis. amount of the judgment, the execution of which was enjoined: and that plaintiff pay costs in both courts.  
March, 1841.

CAZEAU  
vs.  
LESPARRE.

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CAZEAU vs. LEPARRE.

APPEAL FROM THE CITY COURT OF NEW ORLEANS.

The exception of *lis pendens* may be waived, and he who fails to use it, should be presumed to have waived it.

A citation addressed to and served on the agent of the defendant, when the latter is absent from the state, is sufficient to authorize a valid judgment as to the principal.

This is an action of nullity. The present plaintiff seeks to annul a judgment rendered against him in his absence, on the ground that there was another suit pending for the same matter in the Parish Court; and for the further reason that there was no service of citation on him or his agent.

The defendant pleaded the general issue: The evidence shows that while the present plaintiff, Cazeau, was absent, a suit was commenced in the City Court against him, on his promissory note, and his agent Gustave Weiss was regularly cited by a citation addressed to him as agent, &c. and duly served on him by the marshal. There was no defence. Judgment by default was made final against him. The plaintiff, Lesparre, had also taken a non-suit in the Parish Court in the mean time.

On this evidence the presiding Judge of the City Court gave judgment for the defendant, and the plaintiff appealed.

*Pepin*, for the plaintiff and appellant.

*Culbertson*, contra.

*Martin, J.* delivered the opinion of the court.

EASTERN DIS.  
March, 1841.

CAZEAU  
vs.  
JESPARRE.

This is an action of nullity. The plaintiff states that he was sued by the present defendant on a note of hand, in the Parish Court; and having occasion to leave the state, a new suit was brought in the City Court with a view of taking advantage of his absence, and without dismissing the first suit; whereupon judgment was taken by default and afterwards made final; although he had an agent in the state who was not cited: neither was he cited himself personally, or by leaving a citation at his domicile.

Two grounds of nullity are presented. The first is the institution of a second suit without the dismissal of the first, for the same cause of action. The second ground, is the absence of service of citation on either the principal or his agent. The exception on the score of *lis pendens* may certainly be waived; and the party who fails to use it, should be presumed to have waived it. The plaintiff admits that on his departure he left an agent here, who was made a defendant in the second suit as representing his principal. This admission recognizes the authority of the agent to defend the suit; consequently to receive service of the citation, since complaint was made that he was not cited. The citation was addressed to "Gustave Weiss, as attorney in fact of Henry Cazeau," and the marshal attests that it was served on him personally. From the admission of the plaintiff, that on his departure he left an attorney in fact, and that neither himself or said attorney were cited; the inference is strong, that the authority of the attorney, was such, had service of citation been made on him, it would have been sufficient.

The exception of *lis pendens* may be waived, and he who fails to use it, should be presumed to have waived it.

It is therefore ordered, adjudged and decreed that the judgment of the City Court of New-Orleans, be affirmed with costs.

A citation addressed to and served on the agent of the defendant, when the latter is absent from the state, is sufficient to authorize a valid judgment as to the principal.



**EASTERN DIS. STATE vs. JUDGE OF PROBATES FOR THE PARISH OF**  
**March, 1841.**

**ST. JEAN BAPTISTE.**

**STATE**  
**vs.**  
**JUDGE OF PRO-**  
**BATES FOR THE**  
**PARISH OF ST.**  
**JEAN BAPTISTE.**

**AN APPLICATION FOR A MANDAMUS.**

Until a succession, accepted with the benefit of inventory, has been administered, it is under the control and supervision of the Court of Probates, and is not liable to be sold at the instance and recommendation of a family meeting in favor of the minor heirs.

After its liquidation, should there remain any property when the debts are paid, the beneficiary heirs will be put in possession. Any sale that may be necessary must be ordered by the Judge of the parish of the minors' domicile, with advice of a family meeting held there.

This is an application for a mandamus. The tutor of the minors, Hortense and Oneida Guillemin, children of the late F. A. Guillemin, residing in the parish of St. Jean Baptiste, applied to the Judge of Probates for that parish, some time in February, 1841, to convoke a family meeting in behalf of said minors, in relation to a sale of certain property belonging to the succession of their deceased father in the city of New Orleans, where his succession was opened. A family meeting was convoked accordingly and recommended the sale of the property and fixed the terms and conditions. These proceedings were homologated. The petitioner then applied to the same Judge of Probates to order a sale of said property, who refused.

A rule was taken requiring the judge to show cause why a mandamus should not issue directing him to order the said sale. The judge showed for cause the reasons and grounds set forth in the opinion of this court,

*F. B. Conrad*, for the applicant, insisted :

1. That the tutor of the minors was appointed and qualified by the Judge of the Parish of St. John the Baptist, where both tutor and minors reside.

2. That by law the domicile of the minor is that of the tutor ;  
 La. Code, art. 48.

3. The article 336 of the Louisiana Code requires the sale of the property of minors to be authorized *by the Judge, &c.*, and it means the judge of the parish of the minors' domicile—him who appointed and qualified the tutor, and to whom alone the tutor is responsible : Code Practice, arts. 944, 997 ; La. Code, 330.

EASTERN DIS.  
March, 1841.

STATE  
VS.  
JUDGE OF PRO-  
BATES FOR THE  
PARISH OF ST.  
JEAN BAPTISTE.

4. In all matters appertaining to minors the judge of the minor is the Judge of the Court of Probates within whose jurisdiction the minor resides, and the proceedings of the Court of Probates of any other parish would be null and void ; 2 Moreau's Digest, 59, sec. 8 ; 9 Martin's Reports, 489 ; 12 La. Rep., 70 ; 14 idem, 478.

The judge thought himself competent to give the order for the family meeting, and to cause it to be held before him, and the same law which authorized him to do the one, authorizes him to do the other.

*Morphy J.* delivered the opinion of the court.

This is an application for a mandamus to compel the Judge of the Court of Probates for the parish of St. John the Baptist to grant an order for the sale of property, pursuant to the deliberations of a family meeting, of the minors Guillemin, held in the said parish, where the tutor of the said minors reside. In answer to the rule, the judge shows for cause why the writ should not issue :

1. That the succession of the late F. A. Guillemin, the father of the minors, was opened and is still pending and unsettled before the Court of Probates for the parish and city of New Orleans, which, therefore, has the exclusive right of ordering the sale of the property belonging to said succession.

2. That the tutor of these minors being at the same time the duly appointed administrator of the succession, which could be accepted for them but with the benefit of an inventory, cannot apply for such a sale to any other judge than that of the place where said succession was opened.

EASTERN DIS.  
March, 1841.

STATE  
VS.  
JUDGE OF PROB-  
ATES FOR THE  
PARISH OF ST.  
JEAN BAPTISTE.

3. That should the succession be insolvent, which may be the case, the administrator is bound by law to call a meeting of its creditors in order to deliberate on the most advantageous manner of selling the property, and that this meeting can be ordered only by the judge who appointed the administrator.

Until a suc-  
cession, accept-  
ed with the be-  
nefit of invento-  
ry, has been ad-  
ministered, it is  
under the con-  
trol and super-  
vision of the  
Court of Pro-  
bates, and is not  
liable to be sold  
at the instance  
and recommen-  
dation of a fa-  
mily meeting in  
favor of the mi-  
nor heirs.

These reasons appear to us fully satisfactory. Until a suc-  
cession, accepted with the benefit of an inventory has been ad-  
ministered upon, and liquidated, it must of necessity remain  
under the control and supervision of the Court of Probates of  
the parish in which it was opened. Article 1042 of the Louis-  
iana Code provides, that administrators shall have the same  
powers and are subject to the same duties and responsibilities  
as the curators of vacant estates. A change of domicil of the  
minor heirs, who have only a residuary interest in the succes-  
sion, can have no effect or influence whatever in the manner of  
administering it. After its liquidation, should there remain any  
property which it should not have been necessary to sell for the  
payment of the debts, the beneficiary heirs will be put in pos-  
session of it. Any sale that might then become necessary,  
must be authorized and ordered by the Judge of the parish of  
the minors' domicil, with the advice and consent of a family  
meeting; La. Code, 336, 346, 1042, 1044, 1055, 1160; 2 Mo-  
reau's Digest, 438, sec. 7.

After its liqui-  
dation, should  
there remain  
any property  
when the debts  
are paid, the be-  
neficiary heirs  
will be put in  
possession of it.  
Any sale that  
may then be ne-  
cessary must be  
ordered by the  
Judge of the pa-  
rish of the mi-  
nor's domicil,  
with advice of a  
family meeting  
held there.

Let the rule be discharged.

## SHIPMAN &amp; AYRES vs. HAYNES.

EASTERN DIS.  
March, 1841.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

SHIPMAN &  
AYRES  
vs.  
HAYNES.

There is no necessity of stating in full the names intended, or the meaning of the letters placed between the names and sur-names of the plaintiffs, in the petition.

Where a commission is addressed to W. E. notary public, in another state, he is thereby authorized to administer an oath to the party or witness interrogated, whether his official station as Notary authorized him or not.

This is an action by George P. Shipman and Thomas N. Ayres, on four promissory notes subscribed by the defendant Stewart Haynes.

The defendant pleaded the general issue, and denied specially that the plaintiffs were the owners of the notes. He averred that they belonged to one William Ayres, who was largely indebted to him; and that they had been put into the plaintiff's hands with a view to be collected and the proceeds remitted to William Ayres. He prayed that the debt due him by said Ayres be compensated against the notes, and that he have judgment in reconvention for the overplus: and that certain interrogatories which he annexes be propounded to the plaintiffs concerning the ownership of the notes and the property of Wm. Ayres therein.

The plaintiffs in their answers to the interrogatories fully made out their case, and disproved the defence set up. There was judgment in their favor, and the defendant appealed.

*G. B. Duncan*, for the plaintiffs.

*F. Haynes*, contra.

*Martin, J.* delivered the opinion of the court.

This is an action against the maker of four promissory notes. There was an exception to the sufficiency of the petition that it did not set out the full names of the plaintiffs, which was overruled.

The defendant pleaded a general denial; admitted his sig-

**EASTERN DIS.**  
**March, 1841.**

**SHIPMAN &  
AYRES  
vs.  
HAYNES.**

nature to the notes; and averred that they did not belong to the plaintiffs, but that they were the property of one William Ayres, who was largely indebted to him; that the plaintiffs took said notes with a full knowledge that W. Ayres was so indebted. He prayed that said debt due him might be pleaded in compensation and reconvention. He also propounded interrogatories to the plaintiffs touching the ownership of the notes sued on, and the interest of Wm. Ayres in them, which were answered and sworn to before a notary public in New York. On the trial, the defendant's counsel objected to the answers of the plaintiffs to the interrogatories, on the ground that there is no evidence of the judicial capacity of the notary to administer an oath. The answers were received because the name of the officer was stated in the commission, and a bill of exception taken to their admission.

There was judgment for the plaintiffs, and the defendant appealed.

I. The exception was properly overruled. The plaintiffs described themselves as George P. Shipman and Thomas N. Ayres. There was no necessity of stating the meaning of the letters placed between their sur-names and names of the plaintiffs, such letters have often no meaning at all. An individual desirous of being distinguished from another in his vicinity, bearing the same name and surname, places any letter of the alphabet he pleases before his surname; although it be not the initial of any particular name. The Code of Practice,

art. 172, requires a name and surname, not *the names* and surname; so that when a man has two christian names, the first, being the one by which he is most generally known, satisfies the requisites of the law, when the initial of the second is given.

II. The commission under which the plaintiffs' answers to interrogatories were taken, being directed to "Walter Edwards, notary public in the city of New York," authorized him to administer an oath to the parties interrogated, under

There is no necessity of stating in full the names intended, or the meaning of the letters placed between the names and surnames of the plaintiffs, in the petition.

Where a commission is addressed to W. E. notary public, in another state, he is thereby authorized to administer an oath to the party or witness interrogated, whether his official station as notary authorized him or not.

the authority of the laws of this state, whether his official station in New York authorized him or not, to administer oaths. EASTERN Dis.  
March, 1841.

On the merits, the answers to these interrogatories completely destroys the defence set up. BOSTWICK  
vs.  
HIS CREDITORS.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be affirmed with costs.

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### BOSTWICK vs. HIS CREDITORS.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF  
EAST FELICIANA, THE JUDGE THEREOF PRESIDING.

A mortgagee claiming to have a mortgage on some of the property surrendered, given by the *wife of the insolvent*, cannot be admitted to a meeting of his creditors and vote for a sale of the property for cash.

None but a creditor of the insolvent can be present at the meeting of his creditors. A mortgagee only of some of the property surrendered, who is not a creditor, can exercise his hypothecary action against it or its proceeds in the hands of the syndie.

*George Sieber* claimed to be a mortgage creditor of the insolvent and made opposition to the proceedings of the creditors, in voting to sell the property surrendered on a credit; whereas he demanded that a sufficiency to satisfy his claim be sold for cash. There was a judgment overruling his opposition and he appealed.

It turned out in evidence that he was only the assignee of a mortgage given on a portion of the property surrendered, by the wife of the insolvent.



EASTERN DIS.  
March, 1841.

HOSTWICK

VS.

HIS CREDITORS.

*Lawson*, for the appellant, Sieber.

*Muse & Andrews*, contra.

*Martin, J.* delivered the opinion of the court.

This is an appeal from the judgment of the District Court overruling the appellant's opposition to the homologation of the deliberations of the creditors of the insolvent, directing the sale of all the property ceded to be sold on a credit; notwithstanding

A mortgagee claiming to have a mortgage on some of the property surrendered, given by the wife of the insolvent, cannot be admitted to a meeting of his creditors and vote for a sale of the property for cash.

ing the opposition of the appellant, who required the sale of the property which was mortgaged to him, should be for cash.

The claim of the appellant as a mortgage creditor results from the transfer of a deed of mortgage given by the insolvent's wife on certain property with his authorization, to Boatner & Norwood. This, indeed, makes him a mortgage creditor of the wife and authorized him to proceed by the hypothecary action against the syndic, if the property was in his possession; but did not give him the right to appear in the *curso* of creditors, in order to require a sale of the property for cash; for it is only the mortgage creditor of the insolvent who may appear at the meeting and demand a sale of the mortgaged premises for cash. The meeting of the creditors has no direction to give as to the manner of selling property, mortgaged by other persons than the insolvent; although it may make part of what he has surrendered. The opposition was properly overruled.

None but a creditor of the insolvent can be present at the meeting of his creditors. A mortgagee only of some of the property surrendered, who is not a creditor, can exercise his hypothecary action against it or its proceeds in the hands of the syndic.

session; but did not give him the right to appear in the *con-*

It is therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

SALTER *vs.* M'HENRY ET AL.EASTERN DIS.  
March, 1841.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

SALTER  
*vs.*  
M'HENRY ET AL.

Where there are irregularities in the proceedings of plaintiff in issuing a *pluries* writ of seizure; and also in the defendant's enjoining it for the whole, when it was admitted part of the sum claimed was due, the injunction will be dissolved at defendants' costs.

This case commenced by an *alias* order of seizure and sale.

The defendants enjoined on the ground that the seizure was for too much; not allowing a credit of \$800; and for some other alleged irregularities. On the return of the writ "stayed by injunction," the plaintiff amended his petition, allowed the credit of \$800, and obtained a *pluries* order of seizure. This was enjoined on the ground that the *pluries* writ issued without crediting the defendant with the costs previously incurred; and also on the ground that the property was not duly advertised and that the three days notice before seizure was not given to defendant.

The District Judge decided that as to the costs; whether the plaintiff should pay them or not might be determined after the suit, or at any other time, and need not be credited on the writ; that the lots were properly advertised; and that the sheriff's return showed the defendant had a *new notice* of seizure. There was judgment dissolving the injunction with damages and costs. The defendant appealed.

*Potts*, for the plaintiff.

*M'Henry*, contra.

*Martin, J.* delivered the opinion of the court.

On an *alias* writ of seizure and sale being taken out in this case, the defendants obtained an injunction to stay it, on the ground that they had not been allowed credit for a partial payment he had made, for the sum of eight hundred dollars. This writ was returned "stayed by injunction." Shortly after, a

EASTERN DIS. *pluries writ* was obtained, the demand having been reduced March, 1841.

SALTER  
vs.  
M'HENRY ET AL.

by allowing the credit of eight hundred dollars, claimed by the defendants. This was enjoined on an allegation that the credit had not been given to the defendants for the costs previously incurred; that the sale had not been advertised in a newspaper printed in the city of New Orleans, and that the three days notice or demand required by law to be given before seizure, had not been given in this case. The injunction was dissolved and the defendants appealed.

Where there are irregularities in the proceedings of plaintiff in issuing a *pluries writ* of seizure; and also in the defendants' enjoining it for the whole, when it was admitted part of the sum claimed was due; the injunction will be dissolved at defendants' costs.

I. The alias writ of seizure having been enjoined, the plaintiff should have procured the dissolution of the injunction for the balance due after deducting the partial payment of eight hundred dollars, which he had received. He, however, incorrectly obtained a *pluries writ*; but the defendants with very ill-grace sought to turn the plaintiff round on account of this irregularity. They had themselves incorrectly obtained an injunction against the whole of plaintiff's demand, while they had only a right to enjoin but a portion of it.

II. We think with the District Judge that the costs of the previous proceedings were not necessarily to be credited on the *pluries* executory proceedings. The plaintiff in the executory proceedings was probably chargeable with some, or even all the costs, but that fact need not appear on the writ. It might be settled or adjusted after sale.

III. The premises seized were advertised in a newspaper printed in the parish of Jefferson, where they were situated, and the sale was to be made.

IV. The three days notice of seizure under the *pluries writ* are shown to have been given to the defendant by the sheriff's return, according to the provisions of the 736th article of the Code of Practice.

The injunction was therefore properly dissolved.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

ATCHAFALAYA BANK *vs.* HOZEY, Sheriff.EASTERN Dis.  
March, 1841.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

ATCHAFALAYA  
BANK  
*vs.*  
HOZEY, SHERIFF.

Writs of *capias ad satisfaciendum* in the hands of the sheriff, when the act abolishing imprisonment for debt was promulgated, became absolute nullities; an attempt to execute them would make the sheriff a trespasser; and a return of non-est-inventus would not enable the party to proceed against the bail.

This is a proceeding against the Sheriff of the Parish and City of New-Orleans, to make him liable for the amount of the plaintiff's debt against one H. S. Dawson, for not returning a *capias*, which had issued against said defendant, on or before the return day.

A rule was taken on the sheriff to this effect.—To which he replied, that the bail in this case had surrendered the defendant into his custody; that before the return day of the writ, an act of the legislature passed, abolishing imprisonment for debt; and also abolished the writ of *ca. sa.*; that he was unable to hold the defendant by any process, and took a bond from him for his appearance. That he had done all that could be legally required of him.

There was some evidence taken to show that the *capias* was not actually returned, as it purported to be on the return day. From all the circumstances and evidence of the case, the District Judge concluded that the writ was not returned in time; and that the act abolishing imprisonment for debt did not affect cases already in existence, and process which had issued before it went into effect. There was judgment against the defendant, and he appealed.

*Hoffman*, for the plaintiff.

*Lockett & Micou*, contra.

*Martin, J.* delivered the opinion of the court.

EASTERN Dis.  
March, 1841.

ATCHAFALAYA  
BANK  
vs.  
HOZEY, SHERIFF.

The defendant is appellant from a judgment making absolute a rule taken on him as sheriff of the parish of Orleans, to show cause why judgment should not be entered against him in favor of the plaintiffs, for the amount of a judgment which they had obtained against one Henry S. Dawson, with interest and costs; because of his failure, as sheriff, to make a timely return of a *capias ad satisfaciendum*, placed in his hands against said Dawson.

This rule was taken on the 21st April, 1840, under the 17th section of the act of 1826, which makes it the duty of sheriffs to return all writs directed to them into the clerk's office, on or before the return day; and in default thereof, renders them liable to the parties entitled to the benefit of said writs, for the full amount specified therein.

The record shows that the *capias ad satisfaciendum* in this case, issued on the 21st February, 1840, returnable on the third Monday of April following, which was the 20th day of the month. On the 16th April, four days before the return day of the writ, the act of the legislature abolishing the *capias ad satisfaciendum*, was promulgated; and we have held in the case of Cooper against Hodge who was the bail of Hunt, just decided, *ante* 476, that writs of *capias ad satisfaciendum* in the hands of the sheriff not executed, at the time the act in question was promulgated, became absolute nullities. The attempt to execute them would make the sheriff a trespasser. The return of such a writ *non est inventus*, would not enable the plaintiff to proceed against the bail. And the plaintiff in this case being without any interest in having the writ of *capias* returned, cannot complain of any *laches* of the sheriff on the ground that it was not returned in time. Indeed on an examination of the evidence, it by no means appears clearly that the writ was not timely returned.

Writs of *capias ad satisfaciendum* in the hands of the sheriff, when the act abolishing imprisonment for debt was promulgated, became absolute nullities; an attempt to execute them would make the sheriff a trespasser; and a return of *non est inventus* would not enable the party to proceed against the bail.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed,

and that there be judgment for the defendant with costs in **EASTERN Dis.**  
both courts. **March, 1841.**

**STATE**  
**vs.**  
**JUDGE OF FIRST**  
**DISTRICT COURT**

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**STATE vs. JUDGE of the First District Court.**

**ON AN APPLICATION FOR A WRIT OF PROHIBITION.**

A writ of prohibition will not be granted, prohibiting the Judge *a quo* from proceeding to try a cause on its merits, while an appeal is pending from a judgment dissolving an injunction on a matter purely incidental to the main action.

D. T. Walden alleges that during the year 1840, he instituted a suit against the City Bank of New-Orleans to annul certain bonds, notes and mortgages which this institution held of his, on the grounds of usury and other causes of nullity; and that on filing said suit he obtained an injunction against any order of seizure and sale or other proceeding on the part of the Bank, on the act of mortgage which might be instituted against him. That the injunction has since been dissolved and set aside and he has appealed, which is still pending. That notwithstanding the pendency of the appeal, the District Judge is about proceeding to the trial of said cause on the merits. He therefore prays for a rule on the Judge to show cause why a writ of *prohibition* should not issue in the premises. On the rule being taken, the District Judge showed cause, which is fully set out in the opinion of this court, and need not be again stated.

*Hoffman*, for the applicant.

*Bullard, J.* delivered the opinion of the court.



EASTERN DIS.  
March, 1841.

STATE  
VS.  
JUDGE OF FIRST  
DISTRICT COURT

The Judge of the First District in answer to a rule to show cause why a writ of prohibition should not issue, inhibiting his proceeding to try the cause of Walden vs. the City Bank pending on appeal to this court, states, that the suit was brought to annul certain bonds and mortgages given to the City Bank of New-Orleans, on the ground of usury, and that the rate of interest stipulated exceeded that permitted by the charter. That the plaintiff alleges that he fears that pending the action the Bank will bring suit or pray an order of seizure and sale, by which he would be injured, and he obtained an injunction until the further order of the court. That a rule was taken to set aside the injunction, on the grounds—1st. that the petition shows no legal grounds for an injunction—2d. that the amount of the injunction bond was insufficient. Whereupon the injunction was dissolved. The Judge proceeds to say that the rule to set aside the injunction was a distinct proceeding, affecting only the continuance of the injunction as a conservative measure wholly independent of the merits of the case between the parties. That the appeal suspends the operation of the judgment on the rule and secures to the plaintiff all the benefits of an injunction, until its legality shall be passed upon by the appellate court, and that the cause now stands as if no rule had been taken to dissolve the injunction. The Judge further suggests that the issue as to the validity of the contracts could not be passed upon on the trial of the rule, nor on the appeal now pending. That issue yet remains to be tried whether the judgment upon the rule shall be affirmed or reversed, and he sees no propriety in suspending the proceedings upon the merits in order to await a judgment, which, when pronounced can have no effect upon the action of the court. The Judge further answers, that after argument upon the rule, the plaintiff took a judgment by default against the defendant and thus enforced an answer upon the merits.

We think the answer of the Judge quite satisfactory. The

judgment upon the rule, dissolving the injunction, so far from EASTERN DIS. March, 1841. being upon the merits was upon a matter purely incidental. It would not perhaps prevent the granting of another injunction to stay proceedings if the Bank *pendente lite* should sue out an order of seizure upon the mortgages in question. The validity of the bonds and mortgages cannot be examined by the Supreme Court upon the appeal taken from the interlocutory judgment dissolving the injunction, and whether an appeal will lay at all from such a judgment, depends upon the question whether it may operate a *gavamen irreparable*. The cases to which our attention has been called, in which it was held that an appeal divests the court *à quâ* of jurisdiction, or rather suspends its jurisdiction, pre-suppose a final judgment upon which the case is taken before the appellate tribunal. In this case it is clear that judgment final remains yet to be pronounced after a trial upon the merits, and that quite independently of any decision which may be rendered upon the present appeal; for whether the injunction was or was not properly allowed in the first instance, the validity of the mortgages remain to be examined.

Let the rule be discharged.

A writ of prohibition will not be granted, prohibiting the Judge *a quo* from proceeding to try a cause on its merits, while an appeal is pending from a judgment dissolving an injunction on a matter purely incidental to the main action.

### WETMORE & CO. vs. MERRIFIELD.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

It is not required to be proved, that the laws of Mississippi where a note is made payable, does not make it necessary to present it for payment, at the place designated therein, in order to maintain an action against the maker when the want of demand is not pleaded.

**EASTERN DIS.** Parol evidence of the law of a state is admissible, where it appears the common  
*March, 1841.* law only prevails; it is only when the evidence discloses the fact that the law  
**WETMORE & CO.** attempted to be proved is a statute law, that a certified copy is the best  
**VS.** evidence.  
**MERRIFIELD.**

This is an action against the maker of a promissory note executed in New York, and made payable to the order of the plaintiffs, at the Branch of Planters' Bank Port Gibson, Mississippi.

The defendant pleaded the general issue.

Parol evidence was offered to show that in Mississippi it was not necessary that a demand be made on a note payable at a particular place in order to recover; that the common law prevails in that state; the testimony was objected to, but received and a bill of exception taken.

It appears that in practice and according to the decisions in Mississippi that no demand at the place where a note is made payable, is necessary in order to recover.

There was judgment for the plaintiffs, and the defendant appealed.

*Wharton*, for plaintiffs.

*C. M. Jones*, contra.

*Simon, J.* delivered the opinion of the court.

This is an action against one of the makers of a promissory note, executed in the state of Mississippi; the defendant pleaded the general issue, and judgment having been rendered against him for the amount of the note with eight per cent. interest, said defendant appealed.

This case presents no question of any importance; it was admitted by the parties that the interest in Mississippi is eight per cent.

The record however contains a bill of exceptions taken to the opinion of the court, permitting the plaintiffs to prove by parol that by the laws of Mississippi where the note is made payable, it is not necessary to present it for payment at the

place designated therein, in order to maintain an action against the drawer. We cannot perceive the bearing or importance of the fact sought to be proven, as the defendant has not pleaded the want of amicable demand, and as the maker of a note is always bound and cannot plead this matter in discharge of his obligation.—However it is, the Judge *a quo* did not err in receiving parol evidence of a law of a state in which, the testimony shows, the common law prevails; it is only when the evidence discloses the fact that the law attempted to be proved is a statute law, that a certified copy of the statute itself should be produced as the best evidence. 4 *La. Rep.* 382; and there is no necessity of showing that there is no statute law on a particular subject, to be permitted to prove it by parol. 2 *La. Rep.* 154.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be affirmed with costs.

EASTERN DIS.  
March, 1841.

COMSTOCK ET AL  
vs.  
PAIE & SMITH

It is not required to be proved, that the laws of Mississippi where a note is made payable does not make it necessary to present it for payment, at the place designated therein, in order to maintain an action against the maker, when the want of demand is not pleaded.

Parol evidence of the law of a state is admissible, where it appears the common law only prevails; it is only where the evidence discloses the fact that the law attempted to be proved is a statute law, that a certified copy is the best evidence.

### COMSTOCK ET AL, vs. PAIE & SMITH.

#### APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A return that an appellee "was absent from the State," is insufficient to authorize service on the attorney; *non constat*, that his absence was temporary or permanent.

**EASTERN DIS.** Irregularities in service of citation do not authorize the dismissal of the appeal.  
**March, 1841.**

**CONSTOCK ET AL**  
**vs.**  
**PAIE & SMITH.**

This is an appeal from a judgment setting aside a sequestration.

The defendants and appellees moved to dismiss the appeal on the ground that they were not legally cited.

Citation was returned as to Smith not found; and Paie was returned as being absent from the State, and service made on his attorney.

*Eggleston & Clark*, for the plaintiffs.

*Bartlette*, contra.

*Martin, J.* delivered the opinion of the court.

This is an appeal from a judgment setting aside an order of sequestration. The dismissal of the appeal is prayed for on the ground that service of citation was improperly made on the attorney of one of the appellees and no service was made on the other, because he could not be found. The sheriff's return shows that as to the first appellee, "he was absent from the State;" *non constat*, whether this absence was temporary or permanent. The petition of appeal shows that both appellees reside in the State. This might have been, but was not eked out by evidence. According to the late act of the Legislature, passed the 20th March, 1839, the irregularity, if any exists, does not authorize the appellee to demand a dismissal of the appeal, but requires that time should be given to correct it.

It is therefore ordered, that time be allowed until the first Monday in May next, to make new service of citation and petition of appeal on the appellees.

## UNDERHILL ET AL. vs. TOWNSEND &amp; JONES.

EASTERN DIS.  
March, 1841.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

UNDERHILL  
ET AL.  
VS.  
TOWNSEND &  
JONES.

An assignment made by a debtor for the benefit of such creditors as become parties to it, and declared null as to those not parties, does not prevent a creditor who signed from suing and recovering his debt, and to be paid out of the funds in the hands of the assignee or agent of the creditors, *pro rata* with the others.

This is an action against the makers of a promissory note, and a judgment prayed *in solidò* against them.

The defendant, Townsend, admitted his signature but denied that he was liable. He avers that being indebted to the plaintiffs and divers other persons, he made a certain compromise by which he was released from his indebtedness. That on the 19th February, 1838, by an authentic act passed before H. B. Cenas, Notary Public, he transferred and assigned to certain creditors, mentioned in said act, among whom were the plaintiffs, a certain claim against the Louisiana State Marine and Fire Insurance Company, for about \$14,000. That the plaintiffs having become parties to said act, and are irrevocably bound thereby, &c.

Upon these pleadings and issues the case was tried. The character and effect of this assignment has been once before this court already; see 13 La. Rep., 551. In that case the act of assignment was declared null and void as to creditors who were not parties. In this case the plaintiffs had signed and were, with the other creditors (except Walton & Kemp whose claim was to be paid entire) to be paid *pro rata* from the fund assigned.

On hearing the parties and evidence there was a judgment of non-suit, from which the plaintiffs appealed.

Clark & Eggleston, for the plaintiffs and appellants.

Wharton, for the appellees.

Bullard J. delivered the opinion of the court.



EASTERN DIS.  
March, 1841.

UNDERHILL  
ET AL.  
VS.  
TOWNSEND &  
JONES.

This is an action upon a promissory note against the makers in solido. One of them pleads their release by virtue of a compromise entered into with the plaintiffs and other creditors, passed before H. B. Cenas, Notary Public. There was judgment of non-suit, and the plaintiffs appealed.

It appears by the act in question that the defendant, Townsend, assigned to any of the creditors of the firm who might make themselves parties to the act, a claim against the Louisiana State Insurance Company for about fourteen thousand dollars, to be collected by one of the creditors as agent and distributed among those creditors who should make themselves parties to the agreement, after first paying costs, fees of counsel and other expenses incurred in the prosecution. It was agreed that the claim of Walton & Kemp, one of whom was the agent appointed to collect and distribute the fund, should be paid in full and the others à pro rata, and that none of the creditors should bring suit within six months.

This agreement and partial assignment has already been declared to be null as to creditors not parties to it; 13 La. Rep. 551.

It appears to us that the court erred in giving judgment of non-suit. Whether the agreement was valid or void between the parties, it does not purport to release any debts due to the creditors who signed it, and, consequently, if the plaintiffs have shown themselves creditors of Townsend & Jones, it is not easy to perceive why they are not entitled to a judgment, although they may be bound to receive their distributive share of the fund in the hands of the agent of the creditors, and who is made garnishee in the present case.

After this contract has been carried into effect to a certain extent by a partial distribution of the fund, we think it cannot be treated as an absolute nullity by one of the parties to it, and that all the creditors who signed it ought to be made parties to any action having for its object to rescind it as to the contracting parties. The nature of the debt to Walton & Kemp, which

was to be paid in full, does not appear. It may have been of such a nature as to authorize the preference and privilege given it by the other creditors who signed the agreement. Admitting that the agreement is void on its face as to creditors not parties to it, as was held by this court, it does not follow that the parties themselves may treat it as null and void. Having consented to the distribution of a particular fund belonging to their common debtors, among themselves, they may be told, *volenti non fit injuria*. The plaintiffs having proved their demand are, in our opinion, entitled to judgment, but the garnishee is bound to pay over to the plaintiffs only such a part of the fund in his hands as they are entitled to under the agreement.

EASTERN DIS.  
March, 1841.

UNDERHILL  
ET AL.  
VS.  
TOWNSEND &  
JONES.

An assignment made by a debtor for the benefit of such creditors as become parties to it, and declared null as to those not parties, does not prevent a creditor who signed from suing and recovering his debt, and to be paid out of the funds in the hands of the assignee or agent of the creditors; *pro rata* with the others.

The judgment of the Commercial Court is therefore avoided and reversed, and proceeding to render such a judgment as, in our opinion, ought to have been given below, it is further ordered, adjudged and decreed, that the plaintiffs recover of the defendant, Townsend, fourteen hundred and ninety-two dollars and sixteen cents, with interest at five per cent. from the second day of July, 1836, until paid, with costs in both courts; reserving to the plaintiffs their right to receive their share of the fund in the hands of the garnishee, according to his answer, in part discharge of this judgment.

EASTERN DIS.  
March, 1841.

## CANTRELLE ET AL. vs. PERCY.

CANTRELLE  
ET AL.  
vs.  
PERCY.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

The endorser cannot object to the plaintiff's evidence showing that the signature of the maker of the note was erased through error, when he has not set up this defence in his answer; although this circumstance was not alleged in the petition.

When an appeal appears to be taken solely for delay, judgment will be affirmed with the maximum of damages.

This is an action against the endorser of a note, signed "Caboche."

The defendant admitted his signature, and averred that his endorsement had been procured under certain deceptive circumstances, and the note afterwards detained and passed away through fraud; and was not received in the usual course of business.

On the trial, the plaintiff produced a witness to explain the erasure of Caboche's name, and to show it had been erased in error. This was objected and excepted to, as there was no allegation in the petition to this effect. There was no attempt to sustain the defence; and judgment was rendered for the plaintiff; from which the defendant appealed.

*Canon*, for the plaintiff, prayed the affirmance of the judgment, with ten per cent. damages.

*Roselius*, contra.

*Simon, J.* delivered the opinion of the court.

This suit was brought against the endorser of a promissory note of hand; the defendant avowed his signature to the note, and pleaded certain matters in avoidance of the plaintiffs' action, which are entirely unsupported by evidence; judgment was rendered against him, and he appealed.

On the trial of the cause, plaintiffs introduced a witness to show that the signature of the maker of the note was erased through error; the testimony was objected to by the defen-

dant's counsel, on the ground that there was no averment in the petition that said signature had been erased through error; but the Judge admitted the evidence and the defendant took a bill of exceptions.

FOLEY  
vs.  
DUFOUR ET AL.

The Parish Judge did not err: the note is declared upon in the petition as if the signature of the maker had not been erased and is annexed thereto; the object of the evidence was merely to explain the reason why the drawer's signature appeared to have been erased, when the note was produced; and if any material circumstance existed so as to show that the erasure was to effect or destroy the liability of the endorser, it was his duty to avail himself of it in his answer.

The endorser cannot object to the plaintiff's evidence showing that the signature of the maker of the note was erased through error, when he has not set up this defence in his answer; although this circumstance was not alleged in the petition.

On the whole, we think this appeal was taken solely for delay, and that the plaintiffs are entitled to the damages by them prayed for in their answer.

When an appeal appears to be taken solely for delay, judgment will be affirmed with the maximum of damages.

It is therefore ordered, adjudged and decreed that the judgment of the Parish Court be affirmed with costs, and with ten per cent. damages as for a frivolous appeal.

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FOLEY vs. DUFOUR ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

(ON A RE-HEARING.)

Where a party, at the suggestion of the court, submits to a non-suit, on a tender allowing him the faculty to have it set aside, if he is aggrieved by the decision refusing to set it aside, he can appeal.

The syndic is *without authority* to raise mortgages existing on property surrendered, in favor of persons, before it passed into the hands of the insolvent, and who are not his creditors.

EASTERN DIS.  
March, 1841.

FOLEY  
VS.  
DUFOUR ET AL.

This is a hypothecary action on a mortgage purchased by the plaintiff at sheriff's sale, under an execution which issued on his own judgment, against Madame Veuve Elfert, as tutrix of her two minor children, to recover several slaves, subject to said mortgage.

The present defendants are third possessors of these slaves on which the plaintiff's mortgage bears; having purchased them at Marshal's sale.

The evidence shows that Maurice Elfert died in the parish of Assumption, where the present plaintiff resides, in May, 1828. In the same year, his estate was appraised and inventoried, and the widow confirmed as natural tutrix of her two minor children, and in the following year the community property amounting to \$6397, including the slaves in contest, was adjudicated to her with the consent of a family meeting.

On the 11th October, 1834, the present plaintiff obtained a judgment in the Court of Probates against the widow as tutrix of her two minor children for \$1283.38, with 10 per cent. interest thereon, one-half to be borne by each of the minors. Under this judgment he had the *mortgage* existing on these slaves in favor of said minors, seized and sold, and became himself the purchaser.

In the meantime the slaves were sold the 28th March, 1831, by the widow (Marie Rose Rousselle Elfert) to Coulon Jumonville, who became insolvent, surrendered them, with his other property, to his creditors, and they were sold, and the mortgage existing on them raised or attempted to be raised by the syndic in a notarial act. The minors, Elfert, were put on the tableau of distribution as creditors, and on the 13th November, 1834, the tutrix gave the syndic an acquittance for the sum of \$4037 75, on account of the proceeds of these slaves. They were purchased at syndic's sale by Honore Folse; and on the 5th June, 1835, seized and sold by the U. S. Marshal at the suit of Camille Castagné against Folse, and bought by the present defendants.

The District Judge was of opinion the plaintiff could not recover, and suggested that he waive a trial by jury and take a non-suit, with leave to set it aside on motion, which was accepted. On moving to set the non-suit aside, the motion was overruled by the court; it being of opinion that the raising of the mortgage by the syndic exempted the slaves from its effects. From the judgment rendered therein the plaintiff appealed.

EASTERN DIS.  
March, 1841.

FOLEY  
VS.  
DUFOUR ET AL.

*L. Janin*, for the appellant :

The syndic had no right to release this mortgage, even if the release and payment had been real. It has already been stated that the 31st section of the act of 1817, 2 Moreau's Digest, 433, restricts the syndic to the release of the mortgages "in favor of the creditors." In the present case, when Coulon Jumonville bought the slaves, the minors Elfert did not become his creditors. Coulon Jumonville did not assume the payment of this mortgage, he only bought subject to it, and, it is said, paid the full purchase money in cash.

2. The restriction in the act of 1817 rests on obvious grounds. The syndic may raise the mortgages in favor of *the creditors*, because he is their agent and responsible to them, and because they are parties to the proceedings. On the contrary, a mortgage creditor, whose pledge passes, perhaps, without his knowledge, into the hands of a third or fourth purchaser, and is finally surrendered, is not represented by the syndic, has no knowledge of his proceedings, and must assuredly be called upon to present his claim, before his mortgage is extinguished.

3. The question now raised, however important has never been adjudicated by this court. But the reasoning here made use of, is only an extract from the opinion of this court in the case of *Williamson et al. vs. their creditors*; 5 La. Rep., 620. It is now well settled that a probate sale extinguishes all the mortgages granted by the deceased; the settlement of a succession is entirely analogous to that of a surrendered estate,



**EASTERN DIS.** and the same necessity exists in either case for an extinction of  
March, 1841.

**FOLEY**  
**vs.**  
**DUFOUR ET AL.** the mortgages, and still if the property was mortgaged before  
 it was acquired by the deceased, such a mortgage is not raised  
 by the probate sale, but follows the property.

4. It makes no difference that after the sale and the erasure of the mortgage, the minors were, for the first time, put on the tableau as creditors. If the erasure was illegal when made, the subsequent assent of the tutrix could not cure its illegality. Moreover, in this case, the tutrix could not act as the representative of the minors, she being the real debtor, and her interests opposed to theirs.

5. Lastly, this is a mortgage of a peculiar description. It arose from the alienation of the property of the minors, the assent of a family meeting was required to receive it; the same assent is necessary to release or change it. Its release is assuredly the alienation of the minors' property, and should the powers of a syndic be as extensive as contended for by the defendants, they would be restricted in this case by the formalities prescribed for the alienation of the property of minors. It is perhaps correct to say, that this is a debt of a higher nature than any other, which might be due to a minor—it is his tutor's debt—it replaces the minor's real property, and should partake of the stability of real property. If the proceedings attempted in this case, could be sanctioned, there would be very little security for minors against a spendthrift parent.

*Ducros & Marsoudet*, for the defendants, insisted that the plaintiff had lost his right of appeal in taking a non-suit, which is in the nature of a discontinuance; and he cannot afterwards ask relief from this court from a judgment to which he voluntarily submitted.

2. The defendants rely on the release of all mortgages existing on the slaves by the syndic, under the 31st section of the act of 1817; 2 Moreau's Digest, 433.

*Martin, J.* delivered the opinion of the court.

EASTERN DIS.  
March, 1841.

This case is before us on a re-hearing. The defendants and appellees complain that this court erred in rejecting their application for dismissal of the appeal. They urge that a non-suit is a discontinuance of the action, or at least a judgment granted on the solicitation of the plaintiff, who cannot seek relief at our hands when he has voluntarily discontinued his action, or obtained the judgment he asked for.

FOLEY  
VS.  
DUFOUR ET AL.

In the present case, the plaintiff neither discontinued his action nor prayed for a non-suit. On the suggestion of the court he submitted to a non-suit, and waived his right to resist it and insist on a verdict, on a tender allowing him the faculty to have the non-suit set aside. This faculty is often given at *Nisi Prius* to prevent delay in the trial of cases, and afford to counsel time to prepare their arguments and collect their authorities. If, on the hearing of a motion to set aside the non-suit, the party believes that he is injured by the decision of the court, nothing prevents him from seeking relief by an appeal.

Where a party at the suggestion of the court, submits to a non-suit, on a tender allowing him the faculty to have it set aside, if he is aggrieved by the decision refusing to set it aside, he can appeal.

It does not appear to us that we can act on the merits of the case, as requested by the counsel of the defendants.

It appears from the facts disclosed in this case that Maurice Elfert died intestate in the parish of Assumption, in May, 1828, leaving a widow and two minor children; that she was confirmed as the natural tutrix of the minors, and the community property, among which were six slaves and a tract of land on Lafourche, adjudicated to her and affected by a mortgage in favor of the minors for their portion; that the petitioner obtained a judgment in October, 1834, in the Probate Court of that parish against the widow as tutrix of her minor children; that in 1835 a fieri facias issued and the mortgage in favor of the minors was seized and sold to the plaintiff and a sheriff's deed made to him accordingly; that the slaves are now in possession of the defendants who refuse to abandon them or pay the amount of the mortgage; that the widow sold them to Coulon

**EASTERN DIS.** Jumonville, subject to the minors' mortgage; that Jumonville  
March, 1841. became insolvent and surrendered them to his creditors; that

**FOLEY**  
**VS.**  
**DUFOUR ET AL.** they were sold at public auction to one Folse, the syndic having caused all mortgages on them to be cancelled and annulled; that the proceeds of the sale were placed on the tableau to the credit of the minors, and paid over, as is asserted by the defendants and not denied by the plaintiff, to the tutrix and mother of the minors; that in virtue of a judgment obtained in the United States Court at the suit of Camille Castagné against Folse, the slaves were seized and sold to the defendants.

At the trial of the cause the following judgment was rendered by the court below:

"After hearing testimony, on the suggestion of the court, the plaintiff submitted to a non-suit, with leave to said plaintiff to set the same aside; whereupon it is ordered by the court that the jury sworn in this case be discharged from the further consideration of the same."

Among the reasons assigned by the District Judge for refusing to set aside the non-suit, he was of opinion that the syndic of the creditors of Jumonville, had authority to raise the mortgage of the minors, under the 31st section of the law of 1817, 2 Moreau's Digest, 433, which provides that "the syndics, for the purpose of effecting the sale of the property assigned, shall even be authorized to give a release of the mortgages which may exist on said property in favor of any of the creditors: provided they require the other securities which may have been prescribed by the mass of the creditors; and provided, also, that they keep in their hands the proceeds of said property, subject to the same rights in favor of the said mortgage creditors, which they had on the property itself, on which their mortgages existed."

The syndic is without authority to raise mortgages existing on property surrendered, in favor of persons, before it passed into the hands of the insolvent, and who are not his creditors.

It does not appear to us that the minors of Elfert are creditors of the insolvent, within the meaning of this law. Their rights of mortgage arose before the property passed into his hands; they are not parties to the *concurso*, nor has the syndic

any authority to act for them as their mandatory. Being of opinion that the court erred on this point and that the cause must be sent back for further proceedings, it becomes unnecessary to notice any other question raised by the parties.

EASTERN Dis.  
March, 1841.  
FRYER ET AL.  
vs.  
DARCY.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed; that the non-suit be set aside; and the cause be reinstated, and remanded for further proceedings, according to law; the appellees paying the costs of this appeal.

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FRYER ET AL. vs. DARCY.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

Proof of the defendants signature as acceptor; and also of the payee of the bill, when the general issue is pleaded, and the signatures of the acceptors are specially denied, is required before a recovery can be had.

This is an action on a bill of exchange for \$1065 90, drawn by J. Stewart in New York, the 14th December, 1839, payable one month after date to the order of the drawer; drawn on and *accepted by* Gossip & Co., New Orleans; payable at 157 Water street, New York.

There was the record of a suit and judgment in New York, rendered against the defendants, George H. Gossip and James Darcy, for the amount of the bill sued on; but it appears that the defendant Darcy was not cited; the writ being returned as to him, *not found*.

The present suit is instituted on the bill of exchange, and also on the record of the suit in New York.

EASTERN DIS.  
March, 1841.

RYER ET AL.  
VS.  
DARCY.

The defendants for answer, pleaded a general denial; and aver, that inasmuch as oyer of the bill is prayed for and refused by the court, they specially deny *having ever affixed their signatures to the said instrument.*

On these pleadings and issues the cause was tried by the court. There was judgment for the entire amount of the plaintiffs' demand, without any proof being made of the signatures of drawer and *payee* of the bill, and also of the acceptors. After an attempt to obtain a new trial on the ground (among others) that there was no proof of the signatures of any of the parties to the bill, was overruled, the defendant, Darcy, alone appealed.

*L. C. Duncan*, for the plaintiff.

*Micou*, contra.

*Martin, J.* delivered the opinion of the court.

The defendant is appellant from a judgment against him, as the acceptor of a bill of exchange in favor of the plaintiffs as endorsees and holders. Several pleas and exceptions were pleaded, and among them, the plea of the general issue and a special denial of the signatures of the acceptors. The conclu-

Proof of the defendant's signature as acceptor, and also of the payee of the bill, when the general issue is pleaded, and the signatures of the acceptors are specially denied, is required before a recovery can be had.

sion to which we have come on the two last pleas renders it unnecessary to examine any of the others, or the exceptions.

No proof was made of the defendant's signature as acceptor, nor of that of the payee; although the absence of this proof was made the grounds of an application for a new trial, which was resisted by the plaintiff and overruled.

There were two defendants against whom judgment was obtained in the court below; but we have taken notice of the appellant only, as his co-defendant did not appeal.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be annulled, avoided and re-



OF THE STATE OF LOUISIANA.

...to the defendant, James Darty, and that as a result thereof there be judgment in his favor as in case of non-suit, with costs in both courts.

WITNESSETH  
JAMES B. DARTY.

**WEYMAN & THORN vs. CATER & CROFF.**

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

Proceedings on bail bonds when the sureties are sought to be made liable, are to be tried summarily and without the intervention of a jury.

So sureties in a bail bond have the right to proceed by rule, taken on the adverse party, to show cause why the bond should not be cancelled and the sureties discharged.

Whenever a question arises out of a bail bond, either to enforce its payment, or to destroy the surety's liability, such question is incidental to the main action and may be tried summarily without a new suit.

The sureties in a bail given by one of the defendants, Silas B. Cater, took a rule on the plaintiffs to show cause why the bail bond should not be cancelled and the defendant and sureties discharged.

1. From the record and proceedings had in this case it is evident judgment was rendered upon a cause of action which accrued subsequent to the arrest.

2. Judgment was rendered on a supplemental petition filed some time after the arrest and not upon the original petition; and the bail is therefore discharged.

3. It is manifest from the answers to interrogatories and



**EASTERN DIS.** other evidence in the case, that the defendants were not indebted to the plaintiffs at the time of the arrest.

**WEITMAN &  
THORN  
vs.  
CATER & CROFF.**

When the rule was called for trial, the counsel for the plaintiffs objected to going into trial, on the grounds that a rule was not the proper remedy; and secondly that the court had no right to cancel bail bonds, except upon the surrender of the principal, which objections being sustained, the counsel for the rule took a bill of exceptions. The rule was consequently discharged, and the defendants appealed.

*Clark & Eggleston*, for the plaintiffs.

*Elmore & King*, for the defendants and appellants.

*Simon, J.* delivered the opinion of the court.

This case comes up on a rule taken by the sureties in the bail bond of one of the defendants, on the plaintiffs to show cause why the said bond should not be cancelled, and the sureties discharged from any further liability on the same, for the following reasons: 1st. that the evidence and proceedings on file show that judgment was rendered upon a cause of action acquired by the plaintiffs subsequent to the issuing of the arrest.—2d. that the parties have been discharged by operation of law.—And 3d. that from the answers of plaintiffs to interrogatories and other evidence of the case, it is manifest that the defendants were not indebted to the plaintiffs at the time the arrest issued.—The lower Judge being of opinion that a rule was not the proper remedy and that he had no right to cancel the bond by this course of proceeding, except upon the surrender of the principal, discharged the rule, and the sureties appealed.

The appellees contend that the sureties in a bail bond being not parties to the suit in which the bond was given, have no right to move for a rule; and that a bond cannot be cancelled on a rule to show cause except in one instance provided for by

the *art. 232* of the Code of Practice, where the arrested debtor has been surrendered, which is not the case here.

*EASTERN DISTRICT  
March, 1841.*

WEYMAN &  
THORN  
VS.  
CATER & CROFF.

We think the Parish Judge erred: The *art. 755* of the Code of Practice provides that judgment shall be pronounced summarily on all incidental questions arising in the course of a civil trial; and under the *art. 235* and *2d. sec. of the law of 1839, page 162*, proceedings on bail bonds, when the surety is sought to be made liable for the amount of the judgment rendered against the debtor, are to be tried summarily and without the intervention of a jury; the same right is specially allowed to the surety, after the surrender of the person of the debtor, for the purpose of obtaining the cancelling of the bond, and such right is not restrained to the case provided for in the *art. 262*. It is evident from these provisions of the law that the surety on a bail bond is so far considered a party to the suit, that the plaintiff is entitled to proceed against him summarily on simple motion or rule to show cause in the suit in which the judgment has been rendered; if so, we can see no good reason why the means of defence given by law should not be equal to the means of aggression and why the surety should not be permitted to obtain his discharge, on any legal ground he may have to set up, by resorting to the same mode of proceeding. All that relates to or results from a bail bond in a civil action, may be considered as incidental questions arising in the course of the suit; the principal action is the origin and cause of the liability of the defendant's surety on the bond, and without the proceedings on which the arrest was issued, and those subsequently had, the plaintiff would have no claim to set up against the bail. We do not therefore hesitate to say that whenever a question arises out of a bail bond, either to enforce its payment, or to destroy the surety's liability; such question is incidental to the main action, and may be tried summarily and without the necessity of instituting a new suit.

Proceedings on bail bonds when the sureties are sought to be made liable are to be tried summarily and without the intervention of a jury.

So sureties in a bail bond have the right to proceed by rule, taken on the adverse party, to show cause why the bond should not be cancelled and the sureties discharged.

Whenever a question arises out of a bail bond, either to enforce its payment, or to destroy the surety's liability, such questions is incidental to the main action and may be tried summarily without a new suit.

It is therefore ordered, adjudged and decreed that the judg-

**EASTERN** Disment of the Parish Court be annulled, avoided and reversed; March, 1841.

**VARION**

**vs.**

**BELL**

that the rule obtained by the defendant and his sureties be reinstated, and that this case be remanded for further proceedings thereon according to law; plaintiffs and appellees paying the costs of this appeal,

### **VARION vs. BELL.**

**APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.**

Where it is ascertained that more repairs were required on a steam boat than were contemplated between the parties and included in their contract, the contractor will be entitled to the value of his extra work at a fair price, without being liable for the delay occasioned thereby, beyond the time fixed by the contract.

The principal or master workman is only entitled to extra pay for his personal attendance when there is no contract fixing the hire and wages of the workmen employed.

This is an action instituted on a contract, and on an account annexed, charging *extra repairs*, for work and personal superintendence of the plaintiff in hauling out and caulking the steamboat Bayou Sara, belonging to the defendant, in the summer of 1836. The plaintiff claims an additional or extra allowance for work and repairs made by him over and above the sum stipulated in the contract.

The defendant denies the correctness of these extra charges and also his liability to pay them; and avers that by the terms of the contract he is entitled to damages for each day of the detention of the boat beyond the time stipulated for the comple-

tion of the work in the contract; and sets up a reconventional demand. EASTON vs. DILL  
March, 1881.

The case was first tried before the District Court and there was judgment for the defendant; which on appeal to this court was reversed; see 12. La. Rep., 384.

On the return of the cause to the District Court, it was tried by a jury, and a verdict found for the plaintiff in the sum of one dollar; and a new trial was granted.

The cause was ultimately removed to the Commercial Court, and again submitted to a jury, who after hearing all the evidence and arguments of counsel, returned a verdict for the plaintiff of \$1114 43. After an unsuccessful effort to obtain a new trial, from judgment confirming this verdict the defendant appealed.

*R. Hunt & Lockett*, for the plaintiff, showed:

1. That this suit is brought to recover a balance of \$1242 43, for work done to the Bayou Sara, and fully set forth in the contract and account annexed to the petition.

2. The answer pleads payment in full for all that was due; charges that the petitioner had many illegal items in his account, to wit: for attendance, for extra work, for hire of hands, &c.; and claims damages of \$3000 for detention of the steamer. An account, containing the items overcharged, was filed with the answer.

3. The agreement between Bell and Varion consists of two parts: 1. The two first articles stipulate for the hauling out, caulking and launching the steamer for \$1150. 2. The third and fourth articles stipulate the rates to be paid for timber, ship carpenters, &c., and provides that the work should be done to Captain Laurent's satisfaction.

4. *Robert Garland*, the clerk of petitioner, swears that he kept an account of the work done and materials furnished in the repairs of said boat by Varion; that the charges made, corresponded exactly with the prices actually paid by Varion,



EASTERN DIS. and that these were reasonable. This is corroborated by other  
March, 1841. witnesses.

VARION  
 vs.  
 DELL.

5. Mr. Stockton and Captain Spedden, were called on by Captain L. to examine the steamer. Captain L. said he had done all he intended to do to her, all he thought necessary, and wished to have her reported by them, as inspectors, to be a first class boat, and John M'Leary heard Captain Laurent say he was satisfied, &c.

6. Then the contract was *functus officio*. This was seven or eight weeks after the repairs commenced; so says Captain Laurent, Captain Spedden says four weeks. Captain Stockton says some time in July or August, 1836. Garland says prior to 13th August, 1836,

C. M. Jones, for the defendant, contended that by the contract, the hauling out and caulking the boat should have been done for \$1150, and no extra charge of any description was to be allowed; and yet the defendant is charged \$220 for extra caulking, when it is shown the whole would only have cost \$500; and \$4 per day for the personal superintendence of the plaintiff eighty-six days, amounting to \$344, which is more than the original account. There he charged \$3 for the first thirty-two days, and \$4 per day for the last fifty-four days, making a difference of \$32 in his favor. He is not entitled to a dollar of this charge.

2. There was no necessity for extra caulking, if it had been done properly at first. The evidence shows the boat never was properly hauled out, and that consequently she could not be properly caulked while her stern was in the water.

3. By the terms of the contract, the plaintiff was to furnish ship carpenters at \$3 per day, yet he has charged \$3 50 per day, making \$80 50 more than he was entitled to. He has obtained a verdict for more than was due him, under the contract, in the sum of \$612 50, to wit: \$312 50 for his personal superintendence; \$220 for extra caulking; and \$80 50 for

extra carpenter's hire; so that the court will perceive if the plea in reconvention is entirely overlooked, and also the evidence which shows what work was executed under the defendant's direction and paid for by him, the plaintiff is only entitled to the sum of \$629 93 by the most liberal construction of the contract; for these reasons a reversal of the judgment, and remanding the case is asked for; or that it be so amended as to allow only \$629 93.

EASTERN DIS.  
March, 1841.

VARIAN  
VS.  
BELL.

*Morphy, J.* delivered the opinion of the court.

Plaintiff seeks to recover a balance of \$1242 43, for work done and materials furnished for the repair of the steamboat Bayou Sara, according to an account and contract annexed to his petition. The answer pleads payment in full of all that plaintiff is justly entitled; objects to a number of charges in the account, and demands in reconvention \$3000 damages for the detention of the boat thirty days beyond the time necessary for the repairs. This case has already been before us on an appeal brought up by plaintiff against whom judgment had been rendered. Some balance appearing yet due to him, but the evidence not enabling this court to determine its amount or to pronounce finally on the plea in reconvention, the case was remanded. Upon its return to the inferior court, it was laid before a jury, who returned a verdict for the plaintiff in the sum of one dollar. On a new trial being granted, the plaintiff obtained a verdict for \$1114 43; and from the judgment entered up on this last verdict, the defendant prosecutes the present appeal.

The variant views taken of the rights of the parties to this controversy by the two juries who passed upon it and by the District Judge who first had it before him, arose, no doubt, in a great measure, from their different understanding of the contract upon which both plaintiff and defendant rely. It is clear from the evidence that the repairs which it was found necessary



**EASTERN DIS.**  
**March, 1841.**

**VARION**  
**VS.**  
**BELL.**

to make to the boat as the work progressed, were much greater than either party originally contemplated, and this creates the difficulty in relation to the charges objected to in the plaintiff's account, and the unusual delay and detention of the boat complained of by defendant. The repairs lasted from the 11th of July to the beginning of November. From the testimony of the several ship carpenters examined on the trial, we incline to think that the defendant has cause to complain of some loss of time, which the evidence shows has been extremely prejudicial to him, but the jury was perhaps satisfied under the evidence that the plaintiff could not, at that season of the year, procure more hands than he actually employed to do the work, and that it was not his fault if, after having nearly completed such repairs as were first found necessary, he was ordered to take the boat to pieces in order to make her undergo a more thorough repair. As to the account of plaintiff, we have examined it closely in connection with the contract and the evidence in both records. There are only two of the items objected to which, we think, the jury should not have allowed: One is a charge of \$4 per day for plaintiff's attendance during the repairs, and the other for \$3 50, instead of \$3 per day, for the hire of ship carpenters after the 20th of August, 1836. The jury considered that the contract at that date was at an end, and allowed these items as customary charges in the absence of any agreement. In this, we think they erred, so far at least as relates to the ship carpenter's work. By the third article of the agreement, plaintiff engaged to do such ship carpenter's work on the hull, deck and guards of the boat as he would be called upon to do; he was to furnish first rate ship carpenters at \$3 per day, and timber, &c., at stated prices. &c. It appears from the testimony of almost all the witnesses, that the boat had not been entirely hauled out of the water; owing partly to this circumstance the extent of the necessary repairs was not at first ascertained. Before the repairs, however, were completed, Laurent, who superintended the work for defendant

and who had expressed himself satisfied with what had been done, called in the insurance office inspectors some time about the 20th of August, 1836, with a view to have the boat classed.

On this inspection it was discovered that she required more extensive repairs; plaintiff then proceeded by order and the direction of Laurent to make these additional repairs, without a day's interruption, as appears from his own account. As he had bound himself to do all repairs he might be called upon or required to make by Captain Laurent, we consider that the additional repairs were but a continuation of those not yet completed, and were covered by the contract, although not at first supposed necessary by either party. The evidence satisfies us that a charge for personal attendance is customary only when there is no contract fixing the hire of the workmen employed.

EASTERN Dis.  
March, 1841.

MONDELLI

vs.

RUSSELL'S EXECUTRIX

Where it is ascertained that more repairs were required on a steamboat than were contemplated between the parties and included in their contract, the contractor will be entitled to the value of his extra work at a fair price, without being liable for the delay occasioned thereby, beyond the time fixed by the contract. The principal or master workman is only entitled to extra pay for his personal attendance when there is no contract fixing the hire and wages of the workmen employed.

It is therefore ordered that the judgment of the Commercial Court be reversed, and proceeding to give such judgment as, in our opinion, should have been rendered below, it is ordered, and adjudged that plaintiff do recover of the defendant the sum of eight hundred and forty-nine dollars and sixty-three cents, with costs below; those of this appeal to be borne by the appellee.

### MONDELLI vs. RUSSELL'S EXECUTRIX.

APPEAL FROM THE COURT OF PROBATES FOR THE CITY AND PARISH OF NEW ORLEANS.

An executrix cannot be arrested on the opposition and affidavit of a creditor of the estate she administers, on the ground that she will leave the State before her account is homologated, without leaving sufficient funds to pay his debt.

The plaintiff, with some others, opposed the homologation of

**EASTERN DISTRICT**  
**March, 1841.**

**MONDELLI**  
**VS.**  
**RUSSELL'S EXECUTRIX**

the account filed by Maria Russell, as executrix of the estate of R. Russell, deceased, alleging himself to be a creditor for the sum of \$784 72, and that only part of his claim had been allowed. He further alleges that the executrix is about to leave the State for a longer period than the term of her administration; and that under such circumstances it is proper a dative executor be appointed to complete the administration; that said executrix be held to bail to secure the payment of such sum as may accrue to him on a general distribution of the funds of the estate. He makes the usual affidavit for the arrest of debtors and holding to bail under the Code of Practice.

The defendant being arrested, her counsel took a rule on the plaintiff to show cause why the order of arrest should not be set aside; which on hearing the parties, was discharged and the defendant appealed.

*Haynes*, for the plaintiff, admitted women could not be arrested for debt; but in this case the executrix is acting under the authority of the Court of Probates and is amenable to the power that appoints her, to fulfil the trust with which she is clothed.

2. Suppose the account of the executrix had been homologated, and she had refused to pay over to the creditors the several sums admitted to be in her hands, and ordered to be paid to them; it cannot for a moment be doubted that she could be imprisoned until she had complied with the order, in conformity to article 1011 of the Code of Practice.

3. This is the remedy pointed out by law. When a woman accepts a trust she cannot expect to escape the pains and penalties of the law if she fails to perform it faithfully.

*Carter*, for the appellant insisted that women were privileged and free from arrest in all civil cases; C. Pr., 211.

2. There is nothing in this case to take it out of the general rule and provisions of law in relation to the exemption of wo-

men from arrest or imprisonment in any civil cause whatever.

ESTATE OF MARIA RUSSELL, Dea.  
March, 1841.

MONDELLI

RUSSELL'S ESTATE

*Bullard J.* delivered the opinion of the court.

The plaintiff presented his petition to the Court of Probates alleging himself to be a creditor of the succession of R. Russell, deceased; that Maria Russell, the executrix, has rendered an account which was opposed and the oppositions still pending; that a part of his claim was acknowledged by the executrix. He further alleges that she is on the eve of leaving the State for a term which will exceed that of her administration; that under such circumstances it is proper a dative executor be appointed to settle and liquidate the estate. In consideration of the premises the plaintiff alleges that he is entitled to have the executrix arrested and held to bail for such amount and in the manner contemplated by law to secure to him the payment of such sum as may accrue to him on a general distribution of the funds of the estate. He accordingly prays that she may be cited and held to bail, and that a dative executor be appointed, and for general relief. The petitioner swears to the allegations in the petition and to the amount of his debt, and that he verily believes that the executrix is about to remove from the State without leaving in it sufficient property to satisfy his demand, and that the affidavit is not made with the intention to vex Maria Russell but to secure his demand. Therefore an order of arrest was given.

The defendant took a rule on the plaintiff to show cause why the order of arrest should not be set aside, on the ground that neither the facts alleged in the petition nor those sworn to, if true, could authorize the arrest, and that it was illegal. From the judgment discharging this rule the defendant prosecutes the present appeal.

It is clear that article 211 of the Code of Practice forbids the arrest of women, whether married or single, in civil suits when



**EASTERN DIS.** such arrest is resorted to by a creditor, as the means given by  
March, 1841. law to secure the person of the debtor while the suit is pending

**MONDELLI**  
**VS.** or to compel him to give security for his appearance after judg-  
**RUSSELL'S EXEC'X** ment; see articles 210 and 211. That there may be cases, in  
 which a woman acting *à autre droit* as tutrix, curatrix and per-  
 haps executrix, may be arrested and compelled to give security  
 may be admitted. But does the defendant in this case come  
 under any such category? The affidavit is such as the Code  
 of Practice requires in ordinary actions of debt, and the defen-  
 dant expressly claims the right to have the defendant arrested  
 in order to secure to him the payment of such sum as may be  
 found due to him by the estate. He further asks, it is true, for  
 the appointment of a dative executor to complete the liquida-  
 tion of the estate, but the primary object of the arrest appears  
 to have been to secure the debt, the executrix having already  
 rendered an account which in consequence of oppositions had  
 not been homologated.

Courts of Probate have the power to issue orders of arrest  
 in cases in which it is necessary and proper; Code Prac., 1037.  
 But the law must determine the class of cases in which it shall  
 be proper to resort to such a method of coercion. The judge  
 gives as a reason for maintaining the arrest, that in cases ana-  
 logous to the present, Courts of Probate have the right to com-  
 pel a tutor or curator of a vacant estate to give security not to  
 depart without rendering his account and paying the balance  
 due, if any; and he cites articles 351 and 1144 of the Louisi-

An executrix  
 cannot be arrest-  
 ed on the oppo-  
 sition and affida-  
 vit of a creditor  
 of the estate she  
 administers, on  
 the ground that  
 she will leave  
 the State before  
 her account is  
 homologated,  
 without leaving  
 sufficient funds  
 to pay his debt.

iana Code.

It appears to us the plaintiff has not brought himself within  
 the rule established by the above recited articles of the Code,  
 even admitting that executors are subject to the same compul-  
 sory measures with tutors and curators of vacant estates. In  
 the present case an account had already been rendered and the  
 object of the suit was not to compel her to pay the balance of  
 her general account, but to secure to the plaintiff his share of it

as a creditor of the estate. A party prosecuting so severe a **EASTERN DIS.**  
remedy must bring himself strictly within the law. **March, 1841.**

The judgment of the Court of Probates is therefore reversed,  
and ours is, that the order of arrest be set aside, and that the  
appellee pay the costs of both courts.

**BUEL**  
**vs.**  
**NEW YORK**  
**STEAMER ET AL.**

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**BUEL vs. NEW YORK STEAMER ET AL.**

**APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.**

A party should not be permitted to take a second rule even for a new cause after having unsuccessfully attempted to sustain the first one for the same purpose, unless the new cause should have arisen afterwards.

A witness may be introduced and examined by either party after the evidence is closed, when offered before commencing the argument.

Proof of the signatures of the subscribing witnesses to an act *sous seing privé*, by the testimony of a witness, will suffice without their production.

An act of sale under private signature not recorded, is sufficient to prove ownership of a slave, when there is no adverse claim, and to show the defendant's liability for his loss.

The captain of a steam boat is answerable for the damage occasioned by the engineer in bringing a slave on board, or acts of those employed by him, even when these acts are done contrary to his instructions and without his knowledge.

To make the captain or owners of a steam boat liable for a lost slave, the plaintiff must in all cases, prove he could have prevented the act complained of, but did not.

An exception, to the charge of the court to the jury, must be taken when the judge shall have finished his charge; before the jury retire and in their presence.

Where it is shown a slave was allowed to go on board defendants' steam boat and be carried out of the state, he is liable for his value and all costs and damages, and cannot be excused on the pretext that the slave passed for free.



EASTERN DIS.  
March, 1841.

HUEL  
vs.  
NEW YORK  
STEAMER ET AL.

This is an action against the captain and steamer New York, to recover the sum of \$1500 as the value, and \$200 for expenses, of the slave Prince, which the plaintiff alleges belonged to him, and was carried away by said boat in the month of June, 1836; He prays judgment for said sum, and that the steam boat be sequestered.

The defendant, E. W. Burge, captain of said boat pleaded a general denial.

Upon these pleadings and issues the case was tried before the court and a jury.

The plaintiff offered evidence of his being the owner of the slave, by producing an act of sale *sous seing privé*, to himself from Benjamin F. Buel, in the territory of Florida, the 22d March, 1831, executed in the presence of witnesses. The signatures of the witnesses were established by testimonial proof of their handwriting, without their production; but the act was not recorded. Both the proof and admission of this instrument was objected and excepted to.

The evidence of the engineer shows that the boy now claimed came on board the steamer New York under a false name, stating he was free, and had just came off the steamer Farmer from Cincinnati. He was employed by the engineer without the knowledge of captain Burge; who had given directions not to employ any negro without first seeing that he had free papers; but in this instance from his own story that he was free, no free papers were demanded. By the time the boat reached the mouth of Cumberland river it was ascertained that the boy was a slave, and captain Burge had him handcuffed, put on board the Black Hawk with directions to bring him to New-Orleans, and lodge him in jail. His passage was paid, but on the way to New Orleans he made his escape. The owner never found him.

There was a verdict and judgment for the plaintiff in the sum claimed, and the defendant appealed.

*Strawbridge*, for the plaintiff.

*Hennen, contra.*

EASTERN DIS.  
March, 1841.

*Simon, J.* delivered the opinion of the court.

BUEL

vs.

NEW YORK  
STEAMER ET AL.

Plaintiff alleges that in the month of June, 1836, the steam boat New York, captain Burge, carried away a slave named Prince, the property of said plaintiff, which never was returned, and was lost in consequence of his being carried away out of the state by the said steam boat, that the said slave was worth \$1500, besides which, plaintiff avers he has sustained damages by the absence of his said slave and expenses in endeavouring to recover the same, to the amount of \$200. He prays that a writ of sequestration issue against the steam boat New York; and for judgment for the sum of \$1700.—The defendant pleaded the general issue, and the case having been tried by jury, a verdict was found in favor of the plaintiff for \$1700; and after an unsuccessful attempt to obtain a new trial, the defendant appealed.

Our attention has been drawn to several bills of exceptions.

The first was taken by the defendant to the refusal of the court to let him go into any evidence to support his second rule to set aside the writ of sequestration, said defendant offering to prove that the bond had not been filled up until after the rule was taken, and that he was ignorant of the fact when the first rule was taken; we think the Parish Judge did not err: a first rule to the same purport and effect had previously been taken, acted and decided upon, although the defendant had been allowed to bond the boat, and to obtain possession of the property sequestered. We are not ready to say that a defendant should be permitted to take a second rule even for a new cause after having unsuccessfully attempted to sustain a first one for the same purpose; unless the new cause should have arisen afterwards.

A party should not be permitted to take a second rule even for a new cause after having unsuccessfully attempted to sustain the first one for the same purpose; unless the new cause should have arisen afterwards.

The next was taken to the Judge's permitting the introduction in evidence of a *sous seing privé* act of sale of the slave Prince, after having received the proof of the signature of the

EASTERN DIS.  
March, 1841.

BUEL  
vs.  
NEW YORK  
STEAMER ET AL.

vendor only; the objections were: 1st. that the subscribing witnesses thereto were not produced nor their signatures proven; and 2d. that the act had never been recorded in the Parish of Orleans.

It is unnecessary to examine the first objection, because the record contains the testimony of a witness who was examined to prove the signatures of the subscribing witnesses, and who proved them satisfactorily; this testimony however was rejected by the court on an objection made by the defendant that it was too late, as it was offered after the parties had closed their evidence, but before the argument had begun, and the plaintiff took a bill of exceptions. In this, we think the Judge erred: the 484th art. of the Code of Practice says expressly that it is only *after the argument has commenced* that no witnesses can be heard without the consent of all the parties; and we are unable to discover any reason why the court *à quâ* should have rejected this evidence which was produced before commencing the argument, although the parties should have previously said that their evidence was closed. It seems to us that the lower court ought not to have listened to such an unfounded objection on the part of a party who had complained, in a previous bill of exceptions, of the absence of the very same testimony offered; and should have admitted it at least for the furtherance of justice.—We shall therefore consider this evidence as being legally before us, and as supplying the defect on which the first objection was based.

The second ground of objection appears to us untenable: the only object of the plaintiff in producing the act of sale, was merely to show that he was the owner of the slave; it was a simple question of fact; there was no adverse title set up against his; the defendant did not pretend to own the slave nor to have any right contradictory with the plaintiff's; and we are unable to conceive how he could seriously contend that his legal rights were to be affected by the want of registry of the act of sale in question; it is clear that it could

A witness may be introduced and examined by either party after the evidence is closed, when offered before commencing the argument.

Proof of the signatures of the subscribing witnesses to an act *sous seing privé*, by the testimony of a witness, will suffice without their production.

An act of sale under private signature not recorded, is sufficient to prove ownership of a slave, when there is no adverse claim, and to show the defendant's liability for his loss.

not lessen or increase his liability to repair the injury alleged to have been sustained. EASTERN DIS.  
March, 1841.

The third bill of exceptions, which specifies the numerous grounds upon which the appellant's counsel challenged the array, cannot be inquired into; because the parol and written evidence, adduced to support the defendant's objections, is not in the record. It was the appellant's duty to procure the means of judging of the legality and regularity of the venire and of all the proceedings had in drawing the jury, as the statements made in the bill of exceptions are not sufficient to enable us to do so. We must therefore disregard the challenge to the array, as from the bill itself, it does not appear that there was any *material* irregularity, if any, in drawing the jurors. 12 La. Rep. 453. BUEL  
CO.  
NEW YORK  
STEAMER ET AL.

The last bill of exceptions was taken to the charge of the court to the jury, in these words: "*that the defendant was liable for the value of the slave sued for, even if he was brought aboard by the engineer of the boat acting under the captain contrary to his, the captain's instructions, and without his knowledge.*" We think the Parish Judge did not err: The captain of a steam boat is answerable for the damage occasioned by the engineer in bringing a slave on board or acts of those employed by him, even when these acts are done contrary to his instructions and without his knowledge.

It is perfectly clear that the defendant is answerable for the damage occasioned by the acts of those he had employed on board of his boat, and he cannot excuse himself on the plea that those acts were done contrary to his instructions and without his knowledge; *La. Code, art. 2299—11 La. Rep. 209.*

*Story on agency, page 313, No. 308.—1 M. D. 680 & 691.—Laws of 1835, page 152.—Laws of 1839, p. 120.*—This rule however, as stated by the court, did not dispense with the proof that the defendant could have prevented the act complained of, but did not.

to make the captain or owners of a steam boat liable for a lost slave, the plaintiff must in all cases, prove he could have prevented the act complained of, but did not. An exception, to the charge of the court to the jury, must be taken when the judge shall have finished his charge; before the jury retire and in their presence.

It is perhaps proper to notice that this exception to the charge of the court was taken after the jury had retired; this



EASTERN DIS. is certainly irregular and ought not be allowed. According  
March, 1841. to the 517th art. of the Code of Practice, the rule is that the

BUEL  
vs.  
NEW YORK  
STEAMER ET AL.

party dissatisfied with the charge of the court, must require the Judge to give his opinion in writing and take his exception to it *when the Judge shall have finished his charge to the jury*; this does not contemplate that no objection being made to the charge, the party shall be at liberty to except to it after the jury has retired. It seems to us on the contrary that all the objections to the charge ought to be made in the presence of the jury, in order to enable the court to correct immediately any erroneous instructions; and that if not made then, all such objections and exceptions should be considered as waived.

On the merits, we are satisfied that no error has been committed: The plaintiff has satisfactorily proven his title to the

Where it is shown a slave was allowed to go on board defendants' steam boat and be carried out of the state, he is liable for his value and all costs and damages; and cannot be excused on the pretext that the slave passed for free.

slave in question; a witness has testified to have seen said slave in the possession of the plaintiff for several months in the year 1835; the evidence is clear that said slave was carried away on board of the steam boat New York; nothing shows that he concealed himself there so as not to be discovered before being out of the state; on the contrary he was seen on board by several persons who knew him; he was received there as a free man without any inquiry being made about his papers; his presence on board cannot have been unknown to the captain, whose duty it was to comply with the requisites of the law; and we think that the least degree of diligence used by the defendant would have enabled him to prevent the injury complained of.—It is consequently our opinion that the verdict of the jury ought not to be disturbed.

It is therefore ordered, adjudged and decreed that the judgment of the Parish Court be affirmed with costs.

## LOVELL ET AL. vs. CARTWRIGHT.

EASTERN Dis.  
March, 1841.

## APPEAL FROM THE COURT OF THE FIRST DISTRICT.

LOVELL ET AL.  
vs.  
CARTWRIGHT.

Service of a supplemental petition with citation is insufficient to bring the garnishees before the court when there has been no service of the original petition on them.

Until garnishees are served with a copy of both the original and supplemental petitions they are not required to answer interrogatories, and consequently these cannot be taken for confessed.

Second garnishees are entitled to have the amount attached in the hands of the first ones, deducted from the amount claimed, and are only liable for the remainder.

This is an action against the defendant, Cartwright, who resides or is absent in Texas, on his note for \$830 91, with interest.

The plaintiff's annexed an affidavit and propounded interrogatories to the firm of Peyroux, Arcueil & Co., and had them cited as garnishees, requiring them to answer touching property or effects of the defendant in their hands.

The garnishees answered that "they had six bales of cotton consigned to them by the defendant, Cartwright, as part payment of a certain sum of \$10,500, which he owed them; otherwise they had no other goods, effects, &c., belonging to said Cartwright, &c."

The plaintiffs now amended their petition and propounded interrogatories to A. Rivarde & Co. The sheriff returned that he served "petition and citation on A. Rivarde & Co." The firm took no notice of the interrogatories and they remained unanswered.

There was judgment against the defendant for the sum claimed, with privilege on the six bales of cotton attached in the hands of Peyroux, Arcueil & Co., garnishees, and that they hand over said cotton or its proceeds in payment.

Judgment was on the same day entered up against Rivarde & Co., the second garnishees, for the whole amount of plain-



EASTERN DISTRICTS' claim, on failing to answer the interrogatories, which were taken *as confessed*. A. Rivarde & Co. appealed.

LOVELL ET AL.  
VS.  
CARTWRIGHT.

*Maybin*, for the plaintiffs, urged the affirmance of the judgment.

*Canon*, for the appellants, assigned errors.

*Simon, J.* delivered the opinion of the court.

This suit was brought by attachment to recover the sum of \$830 91, with interest; Peyroux, Arcueil & Co. having been cited as garnishees, answered the interrogatories propounded to them by admitting under oath that they had in their possession six bales of cotton belonging to the defendant, and nothing else. A few days after the filing of the garnishees' answers, plaintiffs obtained leave to file a supplemental petition, alleging simply that they had discovered property of the defendant in the hands of A. Rivarde & Co., and praying that they be made garnishees and ordered to answer under oath certain interrogatories annexed to the said supplemental petition.

A. Rivarde & Co., having failed to answer the interrogatories, they were taken *as confessed*, a judgment by default was taken against them, which was afterwards made final, ordering said garnishees to pay to the plaintiffs *the whole amount* by them claimed, and for which judgment was on the same day rendered against the defendant. A. Rivarde & Co. appealed.

The appellants have assigned as error apparent on the face of the record that judgment was rendered against them, without any evidence to show that they had in their hands any sums of money or goods whatever belonging to the defendant; this necessarily leads us to the enquiry whether the garnishees were regularly before the court, when the interrogatories were taken *pro confessis* and when judgment was rendered accordingly; for if they were not, the judgment was undoubtedly unsupported by evidence.

According to arts. 250 and 252 of the Code of Practice, a

garnishee may be made party to a suit; and be cited to answer interrogatories on facts and articles, either by praying to that effect in the original petition, or by a supplemental petition; and the clerk must deliver to the sheriff *a copy of the petition* and of the interrogatories annexed to it, with a citation directed to such garnishee to answer the same within the delay given in ordinary suits. In this case, it is contended that the garnishees were not served with a copy of the petition; and that, not knowing the nature of the plaintiffs' action, nor the amount of the demand, they were unable to answer the interrogatories, and were not bound to notice them. The return made by the sheriff on the back of the citation served on A. Riverde & Co. is in these words: "Received, 4th February, 1840, and on the same day served petition and citation on A. Riverde, of the firm of A. Rivarde & Co., garnishees, in person." This, perhaps, in ordinary cases, would be considered as *prima facie* evidence of a legal service and might be deemed a compliance with the arts. 252 *et seq.* of the Code of Practice, if it were not that on recurring to the citation itself, it clearly appears that the garnishees were only served with a copy of the supplemental petition, and that no copy of the original one was ever delivered to them. The citation recites that A. Rivarde & Co. are cited "to answer in writing under oath the interrogatories annexed to the *supplemental petition* of which *a copy accompanies this citation* within ten days after service thereof, otherwise judgment will be entered against them *for the amount claimed* by the plaintiffs, with interest and costs." The supplemental petition, therein alluded to, contains no statement whatever of the plaintiffs' action, and does not in any manner show *what amount is claimed* by the plaintiffs with interest and costs, and as a supplemental or amended petition is nothing but a part or a continuation of the original petition, in which all the circumstances relative to the action are stated, which the parties defendant have need of knowing, in order to put them on a just defence of their rights; and as the law re-

EASTERN DIST.  
March, 1841.

LOVELL ET AL.  
VS.  
CARTWRIGHT.

**EASTERN DIS.** quires in positive terms that the garnishee should be served  
**March, 1841.** with a copy of the petition, meaning of the entire petition and  
**LOVELL ET AL.** not of a supplement thereto, and of the interrogatories, to an-  
**VS.** swer the same as in ordinary suits, we are not prepared to say  
**CARTWRIGHT.**

Service of a supplemental petition with citation is insufficient to bring the garnishees before the court when there has been no service of the original petition on them. that the service of the supplemental petition and interrogatories thereto annexed, is sufficient to bring the garnishees legally before the court, and to entitle the plaintiffs to a judgment by default against them. A writ of attachment is one of those extraordinary remedies which the law grants in certain cases to creditors for the purpose of securing their claims, by the seizure before judgment of the property, rights and credits of their debtors; such seizure is generally levied on property or sums of money in the hands of a third person, whose rights may be affected by the proceedings, and who thereby becomes materially interested in the controversy, and in such extraordinary

Until garnishees are served with a copy of both the original and supplemental petitions they are not required to answer interrogatories, and consequently these cannot be taken for confessed. cases, this court has always held that the formalities of the law should be strictly pursued; 3 *La. Rep.*, 18; 8 *idem*, 587. It seems to us, that, in accordance with this rule, the appellants were entitled to the service of a copy of both original and supplemental petitions; that this not having been done, the interrogatories, the object or application of which was unknown to the garnishees, could not be taken as confessed; that no judgment by default could properly be entered against them, and that the final judgment complained of was really rendered without any evidence to support it.

There is another error apparent on the face of the record, which the appellants have not assigned, but which we cannot forbear noticing; it is this: The judgment rendered against the defendant, and the first garnishees, Peyroux, Arcueil &

Second garnishees are entitled to have the amount attached in the hands of the first ones, deducted from the amount claimed, and are only liable for the remainder. Co., orders the six bales of cotton attached in the hands of the said garnishees to be handed over by them or their proceeds to the sheriff in satisfaction of the judgment; yet, by the judgment appealed from, the appellants are made liable and are condemned to pay *the whole amount* of the plaintiffs' claim, without allowing them any credit for the proceeds of the cot-

on first attached. This is certainly incorrect, as the second garnishees were at all events entitled to a deduction or credit on the amount claimed, for the proceeds of the property which had been attached previous to their being made parties to the suit; the plaintiffs had no right to the double payment of a portion of their demand.

It is therefore ordered, adjudged and decreed that the judgment of the District Court, so far as it concerns the appellants, be annulled, avoided and reversed; and that this case be remanded to the lower court, to be proceeded upon according to law; the plaintiffs and appellees paying costs in this court.

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**SEGHERS ET AL. vs. COURCELLE.**

APPEAL FROM THE PARISH COURT FOR THE CITY AND PARISH OF NEW-ORLEANS.

The act of 28th March, 1840, abolishing imprisonment for debt, section 5, authorizing two creditors having 2 or more judgments each exceeding \$300 to unite in a petition requiring the common debtor, who they swear has assets, to make a surrender; also requires that both creditors shall take the oath. It is not sufficient that one of them, having two judgments, alone shall make the affidavit.

The first and oldest mortgagee, who purchases in the premises, is subrogated, to all the rights under this mortgage, sufficient to repel a younger mortgagee, seeking to disturb him.

This case comes up under a proceeding in pursuance of the 5 section of the 28th March, 1840, abolishing imprisonment for debt. It provides "that whenever two or more final judgments, each for a sum exceeding 300 dollars shall have been rendered against a debtor and execution issued thereon and



EASTERN Dis. returned "no property found," and *the plaintiffs* shall unite in March, 1841.

SEGHERS ET AL. a petition setting forth *under oath* that they have reason to believe that the defendant has property or rights, assets, &c.  
VS.  
COURCELLE.

within the state which may be made available to the creditors, the court shall order such defendant to show cause within 10 days why he should not pay such judgments, or on default of such payment; why he should not make a surrender of his property to his creditors, &c."

The plaintiffs, D. Seghers and the Louisiana State Bank, alleged they were creditors of Joachim Courcelle, by three several judgments, each for more than \$300, on which executions issued and have been returned, *no property found*. They pray that the defendant be ordered to show cause within 10 days why he should not pay the amount of said judgments, or in default make a surrender of his property to his creditors.

D. Seghers, one of the petitioners made oath at the foot of the petition "that the facts contained in it were true; that he had reason to believe the defendant had property, rights or assets within the State of Louisiana, which may be available to his creditors."

The defendant excepted to the plaintiffs' petition and affidavit. 1. That the debt of the Bank had been settled by one Bernard De Sanos, and the suit and judgment discontinued so far as the Bank was concerned.

2. That the affidavit or oath is taken by but one of the plaintiffs, when the law requires both plaintiffs to unite in the oath; and also to state the reasons which induce them to believe the defendant has property or assets. He prays that the suit be dismissed.

There was judgment on the exceptions setting aside the order, and dismissing the proceedings. The plaintiff Seghers appealed.

*D. Seghers*, in propria persona.

1. The act of 1840, requires that two judgments should have been rendered and the executions thereon returned *no*

*property found*, and that the plaintiffs should join in a petition, &c.; this is in the supposition that the judgments should be in favor of several plaintiffs, but when they are both in favor of the same plaintiff, the junction takes place *ipso facto* and such plaintiff is entitled to act alone.

2. Said act of 1840, does not require that the several plaintiffs, (if several they are,) should *set forth under oath*, &c., but that they should join in a petition, and that this petition should set forth *under oath*, &c., and it, therefore, suffices that their joint petition, should set forth, &c., and that this petition be sworn to by either of the plaintiffs, because then and in such case, *the joint petitions set forth under oath*, &c.

3. The right of action once accrued to the several plaintiffs, (if several be required,) and to each of them, cannot be taken from them or from any of them by the withdrawing of either of the plaintiffs, from the suit.

4. In *Millaudon vs. Allard*, 2 La. Rep. 551, this court held that one may and can be subrogated to himself; why then should he not be considered as uniting with himself, when he invokes the only remedy the legislature has left him on taking away (since he obtained his two several judgments, and since the *fi. fa.* had been returned *no property found*.) the remedy which was secured to him by the insolvent act of 1808; 2 Moreau's Dig. 448.

*Hoa*, for the defendant and appellee.

*Martin, J.* delivered the opinion of the court.

This is a joint petition under the 5th section of the act approved, March 28th, 1840, "abolishing imprisonment for debt," to compel the defendant to pay the claims of the plaintiffs, or surrender his property to his creditors. The plaintiffs are appellants from a judgment sustaining the defendant's exception, on the ground that both the plaintiffs did not de-



EASTERN DIS. declare on oath, that "they had reason to believe the defendant  
March, 1841. had property, rights or assets in the state, which might be  
SECHENS ET AL. made available to his creditors."  
TS.

COUNCELLE.

The affidavit is made and sworn to by one of the plaintiffs only; and he swears *that he has reason* to believe, &c.; while the act under consideration requires, that "the plaintiffs shall unite in a petition setting forth under oath, that they have reason to believe the defendant has property, &c."

The act of 28th March, 1840, abolishing imprisonment for debt, section 5, authorizing two creditors having two or more judgments each exceeding \$300, to unite in a petition requiring the common debtor who they swear has assets, to make a surrender; also requires that both creditors shall make the oath. It is not sufficient that one of them having two judgments, alone shall make the affidavit.

It is clear the requisites of the law in this case have not been complied with. The law requires that it should be sworn, that two creditors have reason to believe, &c.; and as no one can swear that another has *reason to believe*; there must be two oaths of two creditors. Here there is but the oath of one creditor. He necessarily swears to his own belief only; *non-constat*, that this belief is shared by the co-plaintiff.

But the affiant has two judgments against the defendant, and he contends that he is twice a creditor, which in his opinion gives him the capacity of two creditors. He urges that as this court held in the case of *Millaudon vs. Allard*, 2 La. Reports 551, one might be subrogated to himself; why he might not in the present case be considered as uniting with himself. We there held that the mortgage creditor who purchases the premises may repel a younger mortgage creditor seeking the sale of them, on the ground that the older mortgage still exists; because the first mortgagee cannot have a mortgage on property which has become his own. It is clear that in such a case, the older mortgage exists and retains

The first and oldest mortgagee, who purchases in the premises, is subrogated to all the rights under this mortgage, sufficient to repel a younger mortgagee seeking to disturb him.

its priority against the younger ones, which perhaps cease to exist, because the sale under the first mortgage has left nothing for them to act upon. Were the premises purchased by any but the mortgage creditor, the vendee could exercise his right against a younger mortgagee by a kind of subrogation, in the same manner the purchase by the first mortgagee would subrogate him to his original right, against a younger mortgagee seeking to disturb him. From the decision in the above

case it cannot be inferred that a creditor of two judgments can unite with himself in an application for a remedy which the law grants only on the demand of two creditors.

It is therefore ordered, adjudged and decreed that the judgment of the Parish Court be affirmed with costs.

**EASTERN Dis.**  
**March, 1841.**

**SAMORY**  
**vs.**  
**HEBRARD ET AL.**

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**SAMORY vs. HEBRARD ET AL.**
**APPEAL FROM THE CITY COURT OF NEW ORLEANS.**

Where interrogatories are propounded to garnishees under the 13th section of the act of 1839, amending the Code of Practice, having for their object to set aside a sale of immovable property, as simulated and made in fraud of creditors, the City Court of New-Orleans is without jurisdiction of the subject matter. It cannot take cognizance of civil cases of a real nature.

The City Court has express power to try suits on notes or obligations given for immovable property and slaves, and when a rescission of the sale is claimed in the defence.

When title in third persons is sought to be divested on the ground of fraud or simulation, recourse must be had to a direct action of revocation, where a jury may be had.

The proceeding under the 13th section of the act of 1839, is intended to get at property in the possession of third persons, belonging to the defendant, but cannot be substituted for the revocatory action.

This is a proceeding against garnishees, under the 13th section of the act of 20th March, 1839, to amend the Code of Practice.

The plaintiff having obtained a judgment against one Francois Lafargue, caused execution to issue thereon which was returned no property found.

He then presented his petition to the Judge of the City Court of New Orleans, in which he had obtained his judg-

**EASTERN DIST. COURT, March, 1841.**

**SAMONT  
vs.  
HEBRARD ET AL.**

ment, alleging, he had reason to believe that P. A. & A. Hebrard had property or effects in their possession or under their control belonging to the defendant Lafargue, and prayed that they be cited as garnishees to answer interrogatories touching the ownership of certain immoveable property and a slave; and to state whether or not the sale of this property, made by the defendant Lafargue to them, the 18th March, 1839, was real or simulated; and also if they were indebted in any way or manner to Lafargue, to state it fully.

The defendant's excepted to answering the interrogatories, first, that it was seeking to set aside a sale of property, for a sum, far exceeding the jurisdiction of the City Court; second, that it is a proceeding in the nature of a revocatory, and consequently a real action of which the City Court was without jurisdiction; and third, that a direct action alone can be sustained to set aside a sale by authentic act.

The exceptions were overruled, and P. A. Hébrard answered that he owed no money to nor was he indebted in any way to F. Lafargue. A. Hébrard made the same answer.

There was judgment taking the remainder of the interrogatories for confessed, and against the garnishees for the amount of the plaintiff's claim. They appealed.

*Pepin*, for the plaintiff, contended that the 13th section of the act of 1839, under which this proceeding is had, applies as well to immoveable as moveable property; and in case the garnishee shall answer or confess that he has property or effects in his possession, or is indebted to the defendant against whom the plaintiff has obtained judgment, in any sum of money, the court will order him to deliver it up or pay it over in satisfaction of the demand against said defendant.—See Code Pr. in relation to garnishees, art. 262, 263. 5 Louisiana Rep. 86.

2. The plaintiff was not required to institute a revocatory action, as urged by the adverse counsel, as the law of 1839 gives a more simple and summary remedy, and shorter mode

of action. The act itself provides that the plaintiff can get at any property or effects of his debtor, in the hands of third persons, in the same manner as is provided in the ordinary cases of garnishees. The act in question is general and in all cases and proceedings under it can be as well carried on in the City Court as in the other courts.

EASTERN DIST.  
March, 1841.

SAMORY  
VS.  
BERNARD ET AL.

*Benjamin*, for the appellants.

1. The City Court of New Orleans has by law no jurisdiction of civil causes, *of a real nature*; act 19th February, 1825, sec. 3.—1 Mor. Dig. 345.

2. The claim against P. A. Hébrard and A. Hébrard is in its nature nothing more nor less than a revocatory action to annul sales of real estate as being simulated and in fraud of creditors. La. Code 1965 and seq.

3. The revocatory action when for real estate is a *real* action, or at all events of a *real* nature: it is so classed in the civil law by all the authorities.—See Justinian's Institutes, Lib. 4, tit. 6, sec. 6.—C. Pr. 41, 12.

4. That a revocatory action under our law is a real action when brought in relation to real estate, is shown conclusively by art. 1972: for if maintained, the judgment according to that article must be that the contract be *avoided* and the *property* restored and applied to the payment of the claim of the complaining creditor.

5. By the act constituting the City Court and the amendment thereto, (see Grenier's Ed. of Code of Practice, p. 261. No. 74,) the jurisdiction of the City Court is limited to the sum of \$1000, and that only in relation to notes, bills of exchange and drafts—this action tends to declare null and void, as simulated and fraudulent, sales of real estate for \$16,000 or \$17,000.

6. Even if the City Court had jurisdiction, the law requires a direct action of nullity and avoidance to be brought; La. Code, 1965 and seq.; in which parties would be entitled to a jury: the demand cannot be made incidentally as in the pre-



**EASTERN DIS.** sent case where a party would be deprived of his right to a jury.  
**March, 1841.**

**SAMORY**  
**VS.**  
**HÉBRARD ET AL.**

7. The action is prescribed, La. Code, 1981, 1989.

8. The 13th section of the act of 1839, evidently does not apply to this case.—Here the proceeding is not to get at property in our possession belonging to defendant, but to divest our title.

*Morphy, J.* delivered the opinion of the court.

A *fiери facias* issued in this case and having been returned "no property found," the plaintiff filed a petition, propounding interrogatories to P. A. Hébrard and A. Hébrard, in conformity with the 13th section of the act of 1839, amending the Code of Practice. All these interrogatories with the exception of the last one, tended to establish the simulation of certain sales of landed property and a slave to the Hébrards. The latter excepted to the same on the ground that this proceeding on the part of plaintiff was in its nature and effects a revocatory action of which the City Court could not by law entertain jurisdiction. The exception having been overruled,

Where inter- they answered only to the last interrogatory, declaring under rogatories are propounded to oath that they were not indebted to defendant in any sum of garnishees under the 13th money; or in any way whatever. The Judge considering the section of the silence or refusal of the garnishees to answer the other inter- act of 1839, a- rogatories as a confession of the facts therein stated, decreed mending the Code of Prac- tice, having for them to pay the full amount of plaintiff's demand with interest their object to and costs. The garnishees appealed.

set aside a sale of immovable property, as simulated and made in fraud of creditors, the City Court of New Orleans is its being simulated and made in fraud of creditors. Leaving out of view the amount of the property, the City Court was by law without jurisdiction of the subject matter thus sought to be brought before it. It cannot take cognizance of civil cases of a real nature, causes of a real nature; 1 Moreau's Dig. 345. A revocatory

suit when brought in relation to immoveables or slaves is a real action; if it be maintained the judgment must be that the contract be avoided and the property restored and applied to the claim of the complaining creditor; La. Code, art. 1972; Code of Pr. art. 41, 12.—Had the appellants answered the interrogatories by declaring under oath the sales to be real and for a *bona fide* consideration, the plaintiff could not before the City Court have exercised his privilege of controverting their answers and proved simulation and fraud, otherwise that court would be called upon to try incidentally and without any necessity, an issue which could not by law be directly placed before it. True it is that when the defence set up in that court in an action on a note or other obligation, is that such obligation was given for real property or slaves, and a rescission of the sale is claimed for any of the reasons provided for by law, the Judge can take cognizance of and determine such defence; this power has been given by an express law because it was absolutely necessary to enable that court to pronounce judgment in cases coming clearly within its jurisdiction; but here the plaintiff having obtained his judgment, had other courts of competent jurisdiction open to him to attack any sales made by his debtor. When title in third persons is sought to be divested, recourse must be had to a direct action of revocation; in which the parties would be entitled to a jury.

The proceeding under the act of 1839, was intended to get at property in the possession of third persons belonging to a defendant; but it cannot be used as a substitute for a direct revocatory action, the object of which is to test the validity of titles to property in such third persons; by such a proceeding the latter cannot be deprived of any means of defence or advantages they would have in a direct action brought against them—La. Code, 1965 and seq.—5 Martin N. S. p. 361, *Barbarin vs. Saucier*, 2 La. Rep. 214; 9 Idem 379.

It is therefore ordered and decreed that the judgment of the

EASTERN DISTRICT  
March, 1841.

SAMORY  
VS.  
HEDEMAN ET AL.

The City Court has express power to try suits on notes or obligations given for immoveable property and slaves, and when a rescission of the sale is claimed in the defence.

When title in third persons is sought to be divested on the ground of fraud or simulation, recourse must be had to a direct action of revocation, where a jury may be had.

The proceeding under the 13th section of the act of 1839, is intended to get at property in the possession of third persons, belonging to the defendant, but cannot be substituted for the revocatory action.



EASTERN Dis. City Court be reversed and that ours be for the garnishees,  
March, 1841. with costs in both courts.

HYDE  
& GOODRICH  
vs.  
PLANTERS BANK  
OF MISS.

### HYDE & GOODRICH vs. PLANTERS BANK, of Mississippi.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A Bank, employing their notary to protest a note deposited with them for collection is not liable for the official misconduct or failure of the notary to give notice to the endorsers.

So where the defendants put a note, deposited by the plaintiffs for collection, in the hands of the notary of the Bank, who failed to make a record of his protest and notice to the endorser, by which the latter was discharged; held that the notary and his sureties, and not the Bank, are liable.

This is an action to render the defendants liable for the amount of a promissory note for \$662, signed by B. Williams and endorsed by R. J. Walker, negotiable and payable at the Planters' Bank at Natchez, in the State of Mississippi, and placed in said bank for collection. Recourse against the endorser was lost by the neglect of the notary to make a record of his protest and notice to the endorser.

The defendants pleaded the general issue and specially denied any liability on account of said note.

The evidence shows that the note in question was deposited in Bank for collection, and at maturity was handed to their notary to be protested. The notary failed to make any record of his protest and notice to the endorser, and died soon after; in consequence of which, no proof could be made of any notice

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162N 566  
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22N 295

having been given to the endorser, and he was thereby discharged on being sued in Mississippi. EASTERN DIS.  
March, 1841.

The question is, whether the Bank should be made liable for the acts and misconduct of the notary? HYDE  
& GOODRICH  
VS.  
PLANTERS BANK  
OF MISS.

There was judgment for the plaintiffs and the defendants appealed.

*I. W. Smith*, for the plaintiffs and appellees.

1. The Bank is responsible for the neglect of its notary. In *Crauford vs. Louisiana State Bank*, 1 Martin, N. S., 216, the court, by Judge Mathews, say, "the counsel for the plaintiff prayed the judge below to direct the jury that *the holder of a bill for collection*, and having no other interest in the bill than as agent for the purpose of presenting said bill for acceptance and payment, *is bound to use the same diligence in giving notice of non-acceptance*, as is required of a holder who has discounted or purchased a bill." This principle "depends much for its validity on the doctrines of agency; and seems to us, to recognize a *fundamental rule on that subject*, which requires ordinary care and diligence on the part of a mandatory, or such as men of common prudence bestow on their own affairs. We have no doubt of its correctness taken abstractedly."

In *Montillet vs. Bank of the United States*, 1 Martin, N. S., p. 367, the court, by Judge Martin, say: "Banks hold themselves out as the agents of owners of notes or negotiable paper: they find their interest in acting as such. But even if they derived no advantage from it, they would be bound to act correctly in the performance of the assumed duty. No one is bound to attend to the concerns of another, even when a compensation for the trouble attends it, yet he who undertakes it, even gratuitously, is bound to indemnify the person whose business is undertaken from the consequences of his agent's negligence." \* \* "The banks are responsible for the conduct of the person they employ. The notary in undertaking to give notice, did so as a private individual. It is no part of his official

EASTERN DIS. duties." They affirm the doctrine of Crawford vs. the Louisiana State Bank.  
 March, 1841.

HYDE  
 & GOODRICH  
 ES.  
 PLANTERS BANK  
 OF MISS.

In Canonge vs. Louisiana State Bank, 3 Martin, N. S., 344, and in Pritchard et al. vs. Louisiana State Bank, 2. La. Rep., p. 415, this court takes the same view of the Bank's liability for the omission of the notary to notify the endorser.

In Miranda vs. City Bank of New Orleans, 6 La. Rep., 743, the court, by Judge Bullard says, "The principles upon which this case must be decided were recognized AND SETTLED by this court *many years since* in the case of Crawford vs. the Louisiana State Bank, and of Montillet vs. the Bank of the United States; 1 Martin, N. S., 214, 365. It was held that an agent who receives a bill for collection is bound to use the same diligence in giving notice as the holder; that the bank was responsible for the acts of the notary, and that the *onus* was on the agent to show that the holder of the bill sustained no damage by the neglect of the agent to make proper demand, and to give due notice to the other parties to the bill."

In Cotton vs. Union Bank of Louisiana, 15 La. Rep, 370, the principle is admitted by the bank itself.

The principle has been recognized in other cases by this court, but it is presumed that *six* decisions on this point are sufficient to prove the assertion at the bar that the question is no longer open for discussion in this court.

2. The counsel for the Bank maintains that the law is different at *Natchez*, where the note was deposited. He cites Smedes vs. Utica Bank, 20 Johnson's Rep., 383, where the bank was held responsible because their clerk had failed to give the proper notice. The question in this case was not before that court, and their *arbiter dicta* are based on "the course of practice to charge an endorser" in *New York*.

He also cites Bellemire vs. Bank of the United States, where the District Court of *Philadelphia* decides "that banks in this city at least, universally employ notaries to perform the duties in question, compensate them for their trouble, and charge the

amount paid to the holder of the note; *that the custom of the banks is presumed to be known to the holder, and therefore the agency—the collection—is undertaken in reference to the custom, which forms a part of the contract between the parties.*" But what is the "custom" at Natchez? None is proved. Then our own customs are presumed to prevail there.

EASTERN DIS.  
March, 1841.

HYDE  
& GOODRICH  
ES.  
PLANTERS BANK  
OF MISS.

There is little doubt that the Supreme Court of Pennsylvania would reverse the decision of the District Court of Philadelphia. For the Supreme Court of that State in the *Mechanics Bank vs. Earp*, 4 Rawle, p. 393, says, "If the undertaking of the bank was to *collect*, and not merely to *transmit*, they would be responsible for their Virginia respondent."

In *Van Wart vs. Wooley*, 3 Barnewall & Cresswell, p. 439, the Court of King's Bench considered "that the defendants, who cannot be distinguished from, but are answerable for, their London correspondents, Sir John Lublenck & Co., have been guilty of a neglect of the duty which they owed to the plaintiff, their employer."

We submit to the court that the authorities adduced entirely fail to show that at Natchez, in the State of Mississippi, the decision would have been different from that rendered by the inferior court in this case—but that the authorities are adverse to the bank, depending, as they do, in each instance on peculiar *local customs*.

*Tho. Slidell*, for the defendant and appellant, insisted on the reversal of the judgment.

*Morphy, J.* delivered the opinion of the court.

The petitioners allege that they deposited with the defendants at Natchez, in the State of Mississippi, a promissory note for collection; that defendants undertook and bound themselves to use all care and diligence in collecting said note and in case of non-payment to cause good and legal notice thereof to be given to the endorser, Robert J. Walker. That at the



**EASTERN DIS.**  
*March, 1841.*

**HYDE  
 & GODDRICH  
 VS.  
 PLANTERS BANK  
 OF MISS.**

maturity of said note, defendants caused the same to be placed in the hands of T. Redman, a notary public, residing at Natchez, and qualified according to law to demand payment thereof, and to notify in a legal manner the said endorser; that it was the duty of the said Redman not only to notify said Walker of the non-payment of the note, but also to make and keep a fair registry of all his official acts in the premises and to state the manner in which said notice was forwarded; that said note was protested for non-payment by the said notary, who omitted to notify said Walker, and also to keep any register relating to such service, by which fault and negligence the said endorser was released from all liability; that on an action being brought by them against said Walker before the Circuit Court in and for the county of Adams, in Mississippi, a verdict was rendered against them because no proof could be furnished that said endorser had been duly notified of the protest, and that no such proof existed in consequence of the fault and negligence of the notary in omitting to make a full and true record of the service of the notice, as required by law, whereby the petitioners aver that the defendants have become responsible unto them for the amount of such note with interest and the expenses of the suit against the endorser.

The general issue was pleaded. There was judgment below for plaintiffs, and the defendants appealed.

The plaintiffs introduced in evidence the record of the suit in which Walker was discharged. It clearly appears from the evidence as well as from their own averments that their failure to recover in that suit was entirely owing to the neglect and omission of the notary, Redman, to make a proper and sufficient record of the manner in which he had served notice on this endorser; the notary having died before the trial and his record being so deficient as to make no legal proof of such notice, the plaintiff remained without any evidence whatever to establish this material fact, and a verdict was rendered against them.

The question is whether this neglect of duty on the part of the notary is chargeable to the defendants; or whether the notary, being an independant sworn officer, acting under the authority of the State of Mississippi, was not, as such, the agent of the plaintiffs, as much as the defendants, and liable directly to them? The solution of this question, in our opinion, depends on the character of the acts he omitted to do or performed in an illegal or inefficient manner. By reference to the statute law of Mississippi, which has been given in evidence, it is provided "that notaries public, not to exceed three in number in each county, shall be appointed and commissioned by the Governor upon the recommendation of the County Court of the several counties; and that before entering upon the duties of their office they shall take and subscribe an oath, and shall give bond with two good and sufficient sureties in the penalty of \$2000, conditioned for the faithful performance of the duties of their office; which bond shall be recorded with the clerk of the County Court of the county where they reside, and may be sued on by any party or parties injured, in like manner and with like effect as bonds given by sheriffs and coroners for the faithful execution of their respective offices." It is further provided, "that when any notary public shall protest any promissory note, bill of exchange, or other instrument of writing, he shall make and certify on oath a full and true record of what shall have been done therein by him in relation thereto according to the facts by noting therein whether demand for the sum of money mentioned in the same was made, of whom, and where the requisite notice or notices were served and on whom, when the same were mailed (if such be the case), to whom and where directed, and every other fact in any manner touching the same, shall be distinctly and plainly set forth in his notarial record; and when so made out and certified it shall have the same validity, force and effect in all courts of record within the State as if the said notary were personally present and interrogated in open court," &c. From these enactments it was clearly a part

EASTERN DIS.  
March, 1841.

HYDE  
& GOODRICH  
VS.  
PLANTERS BANK  
OF MISS.



**EASTERN DIS.**  
**March, 1841.**

**HIDE  
 & GOODRICH  
 vs.  
 PLANTERS BANK  
 OF MISS.**

of the official duties of the notary to have kept a full and fair record of the manner in which he had served the notice of protest on Walker. The testimony shows that if this had been done, plaintiffs would have had no difficulty in recovering of the endorser; the notary had thus made himself and his sureties liable on his official bond to any person injured by his neglect and failure to comply with this duty imposed upon him by law. Can the defendants then be held responsible for his default. We think not. They used that care, attention and diligence which men of common prudence bestow on their own affairs. They did for plaintiffs all that the latter would have done themselves had they retained the note in their possession. When the holder of a note wishes to possess evidence of the service of a notice on an endorser, he must of necessity substitute another person to perform the service; from the corporate character of defendants it was known that it could be performed by them in no other way than by substitution. In this necessary selection of a sub-agent, common prudence suggested to defendants the propriety of employing one not only competent in every respect to do the particular act of giving notice to the endorser, but whose official duty it was to make out a record, which in case of his death would preserve for plaintiffs, legal evidence of the service he had performed. But the notary, in making out the record required by law, neglected in this case to mention the place to which the notice of protest had been sent to the endorser, and the testimony shows, that he being dead at the time of the trial, no proof of such notice could be made, either by his record or otherwise. To make defendants responsible for this neglect of official duty on the part of the notary, would be rendering them the sureties of that officer; it would be changing the ground upon which alone they can be held liable, to wit: that of negligence in the discharge of their duty to their principals. It is in evidence that T. Redman was the notary of defendants, and did all their business of the same description. If, instead of employing him,

A bank, employing their notary to protest a note deposited with them for collection is not liable for the official misconduct or failure of the notary to give notice to the endorsers.

defendants had given the notice to one of their clerks, or any other individual however competent, and after performing the service, the latter had died, plaintiffs would have had just cause to complain that a course was pursued for them different from that which defendants had found proper and beneficial for themselves. But by acting as they did, it appears to us, that their undertaking was fully satisfied. If, by the fault or neglect of the notary they employed for plaintiffs, the latter have suffered any injury, they must look to the sureties on his official bond, because such fault or neglect was a breach of his official duties; 1 Martin, N. S., 368, Montillet vs. Bank of the United States; La. Code, arts. 2977, 2978; Story on Agency, 189, sec. 201; 20 Johnson, 377, Smedes vs. Utica Bank.

It is therefore ordered that the judgment of the District Court be reversed, and that ours be for the defendants with costs in both courts.

EASTERN DISTRICT,  
March, 1841.

STINSON, CURATOR,  
&c.  
vs.  
BUISSON.

So where the defendants put a note, deposited by the plaintiffs for collection, in the hands of the notary of the bank, who failed to make a record of his protest and notice to the endorsers, by which the latter was discharged, Held that the notary and his sureties, and not the bank, are liable.

### STINSON, Curator, &c. vs. BUISSON.

#### APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Courts are bound to take notice of the date of laws, although there is no evidence of their promulgation, adduced.

The prescription of actions against sheriffs for misfeasance and illegal acts of office, is extended by the act of the 28th February, 1837, from one to two years, from the day of the commission of the acts complained of.

Redress in damages, should in all cases be proportioned to the injury sustained, unless where given as an example to deter others for similar conduct in future.

So a sheriff suffering the escape of a debtor arrested on meane process, his responsibility is limited to the loss actually sustained by the plaintiff; and the actual loss must be ascertained before judgment.

**EASTERN DIS.**  
*March, 1841.*

**STINSON, CURA-**  
**TON, &c.**  
 vs.  
**BUTSON.**

This is an action to render the defendant liable as sheriff, for an escape of the plaintiff's debtor after he was arrested on mesne process.

This suit was instituted the 16th October, 1838, in which the plaintiff alleges that the firm of Stinson & Campbell sued and arrested their debtor E. W. Pennington, on the 15th of October, 1837, for the sum of \$2002; and that while he was in custody, he was permitted by the negligence of the defendant to escape and go at large. That judgment was rendered against Pennington for said debt on the 28th November, 1837, upon which execution issued and was returned "no property found." In the month of May, 1838, a *ca. sa.* issued, and was put into the hands of the defendant as sheriff, which he kept and failed to return until October, 1838, long after the return day. That by reason of said illegal and negligent conduct of said sheriff he has made himself liable for said debt and for which judgment is prayed.

The defendant denied every allegation by which he was sought to be made liable or responsible in any manner for the plaintiff's demand; and further pleaded the prescription of one year against this action.

Upon these pleadings and issues the cause was tried before the court and a jury.

There was evidence produced of the arrest, the proposed sureties in the bail bond, and the escape of the debtor by eluding the vigilance of one of the defendant's deputies.

It was also proved that the plaintiffs in the suit alluded to, had consented to take the firm of Irwin, Hall & Walton as sureties in the bail bond, which would have been done, had not the escape happened; but it also appeared this firm were in insolvent circumstances at the time; and the question arose what amount of loss or injury did the plaintiffs actually sustain by the escape?

There was however a verdict and judgment for the entire amount of the plaintiff's demand, from which the defendant appealed.

*Clarke & Eggleston*, for the plaintiff.

*Roselius*, for the appellant.

*Simon*, *J.* delivered the opinion of the court.

EASTERN DIST.  
March, 1841.

STINSON, CLERK.  
TON, JR.  
BUISON.

This is an action against a former sheriff of the parish of Orleans, for having permitted the escape of a defendant who had been arrested on a writ of *mesne process*. Plaintiffs represent that on the 15th of April, 1837, a suit having been by them instituted against one Pennington for the recovery of a sum of money, a writ of arrest was issued against said Pennington, addressed to the defendant as sheriff of New Orleans, who accordingly proceeded to seize and take the said debtor into his custody; that owing to the negligence of the defendant, said Pennington was suffered to escape and go at large, by means whereof, plaintiffs have lost the whole benefit of their action. They further state, that on the 23d of November following, a judgment was rendered in their favor against Pennington for \$2002 with interest and costs, the amount of which has never been paid. That consequently, they issued a writ of *fieri facias* which was returned, "no property found;" whereupon a writ of *capias ad satisfaciendum* was issued and delivered to the defendant who some time afterwards returned it "*non est inventus*." They also aver that the sheriff kept the writ of *ca. sa.* in his possession without returning the same from the month of May to the month of October, and that from his illegal acts, he has become liable to pay the whole amount of the judgment, as damages.—They pray for judgment against him accordingly.

The defendant pleaded the general issue, denied his responsibility, and pleaded also the prescription of one year against the plaintiffs' action. The case was tried by jury, who found a verdict in favor of the plaintiffs for the sum of \$2000 with eight per cent. interest on \$2000 from the 26th of March, 1836, until paid, and \$51 68 costs incurred in



**EASTERN DIST. March, 1841.** the first suit; from which verdict and the judgment of the court, the defendant appealed.

**STINSON, CURATOR, &c.  
vs.  
HUISSON.**

The facts of the case, are mainly these: Pennington having been arrested by the defendant's deputy, requested him to go with him to Irwin, Hall and Walton's, who, he said, would consent to become his bail; on application, they promised to be his securities; the deputy asked them if they were freeholders, they answered negatively, and he told them that he could not accept them without the plaintiffs' consent. Thereupon a messenger was sent to get plaintiffs' authority. In the mean time, Pennington asked to go down stairs, (as the witness says,) to get a drink, this the deputy would not permit, but Mr. Hall told him not to be afraid; as they would be responsible. A few minutes afterwards, it was discovered that Pennington had made his escape, the messenger returned with the plaintiffs' written consent, but Messrs. Irwin, Hall and Walton, finding that Pennington had escaped, refused to sign the bond. The records of the suit of Irwin, Hall and Walton vs. their creditors, for a respite filed on the 19th of May, 1837, and that of the same persons vs. their creditors for a surrender of property, filed on the 19th of March, 1839,

Courts were also produced in evidence by defendant to show their bound to take state of insolvency.

notice of the date of laws, although there is no evidence of their promulgation, adduced. The first question submitted to our consideration relates to the plea of prescription relied on by the defendant, and grows out of said defendant's exceptions to the charge of the court

The prescription to the jury:—we think there is no necessity for our inquiring deeply into this question, nor for our examining the correctness of the Judge's charge; as it is clear that the plaintiffs' action was brought before the expiration of the time required by law for this kind of prescription. The act complained of by the act of the 28th February, 1837, was committed on the 15th of April, 1837, this suit was instituted on the 16th of October, 1838, and had not the former law day of the commission of the been repealed, the defendant might perhaps have acquired his discharge by the prescription of one year; *Louisiana Code*

art. 3501. But by an act of the legislature, approved on the 28th of February, 1837, entitled "an act to extend the time of prescription in reference to the acts of sheriffs," it is enacted: "that no sheriff or his security or securities shall be able to prescribe against his acts of misfeasance, non-feasance, costs, offences and quasi offences, but after the lapse of two years from the day of the commission of the acts complained of." As this court has said in the case of *Léglise vs. Breton*, 3 La. Rep. 436: "courts are bound to take notice of the date laws are promulgated, although no evidence of the fact of promulgation has been adduced." In this case, there is no proof of the date of the promulgation of the law, but there is no doubt, and we may fairly presume it, that it was in force at the seat of government before or at least at the time the escape occurred, which was forty-six days after the approval of the law.—On the other hand, supposing the old law to have remained in force for some time after the 15th of April, 1837, (which we are confident cannot be the fact,) eighteen months only having elapsed between said date and the institution of the suit, it would have required, by computing the time that it should have run under both laws, more than three months under the old law to complete it with the balance of the time under the new law. Thus, it is clear that the defendant cannot be benefited by his plea of prescription, as even taking the date of the publication of the pamphlet published by authority, as the date of the promulgation of the law, the time run between the two dates would not be sufficient to complete the prescription.

But it is urged by the appellant's counsel that the defendant's liability ought to be limited to the loss actually sustained by the plaintiffs, and that, from the evidence adduced, he cannot be answerable for the whole amount of the judgment obtained against the defendant in the original action. The responsibility of offenders and negligent persons are laid down in broad terms by the arts. 2294 and 2295 of the La. Code;

EASTERN DIS.  
March, 1841.

STINSON, CLERK-  
TOR, &c.  
vs.  
BUISSON.



**EASTERN DIS-**  
**March, 1841.**

**STINSON, CURA-**  
**TON, & Co.**  
**vs.**  
**WILSON.**

Redress in damages should in all cases be proportioned to the injury sustained, unless where given as an example to deter others for similar conduct in future.

So a sheriff suffering the escape of a debtor arrested on meane process, his responsibility is limited to the loss actually sustained by the plaintiff; and the actual loss must be ascertained before judgment.

the latter of these is applicable to the cause now under consideration; it is in these words: "every person is responsible for the damage he occasions not merely by his acts, but by his negligence, his imprudence and his want of skill."—It is certainly a principle of law that there can exist no wrong without a remedy; yet it seems to us that redress in damages should in all cases be proportioned to the injury sustained, unless it be where they are given as an example to deter others from similar conduct in future, and really for the purpose of punishing men for their bad motives and intentions. But in this case, the injury arose from a mere act of imprudence of the defendant's deputy, and while he was in a fair discharge of

his legal and official duties; and if so, the doctrine established by this court in the case of *Clark vs. Wright*, 5 *Martin N. S.* 122, in which this court says: "we understand the law to be, that if the sheriff permits an escape on *mesne process*, his responsibility is limited to the loss actually sustained by the plaintiff," is clearly applicable; and the question then presents itself, what loss did the plaintiffs in this case, really sustain? Had not Pennington made his escape, Irwin, Hall and Walton would, by the written consent of the plaintiffs, have become his bail, and would perhaps subsequently have been answerable for the consequences of their suretyship, if they had failed to present the person of the debtor on execution of the definitive judgment rendered against him, *C. of Pr.* 235; but it has been shown that the judgment against Pennington was only rendered on the 23d of November, 1837, that the *fi. fa.* was returned on the second of April, 1838; that the *ca. sa.* was also returned on the 5th of July following, and that the sureties had already declared themselves to be in insolvent circumstances by filing their petition for a respite on the 19th of May, 1837. From these facts, it is clear that the plaintiffs would not have been in a situation to recover the whole amount of their judgment from the sureties on the bond after the month of July, 1838, since it is in proof that they

absolutely failed a short time afterwards. Moreover, no gross or culpable negligence or extraordinary imprudence can be attributable to the officer, and we are not prepared to say that, under such circumstances, the measure of damages should be the whole amount of the judgment. Nothing however has been shown to the court below by which the amount of damages may be fairly ascertained, but as it would be unjust to put the plaintiffs, at the expense of the defendant, in a better condition than they would have been, if Pennington had not made his escape, and had furnished the bail by him offered, we think justice requires that this case should be remanded for the purpose of assessing the real damages sustained by the plaintiffs.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed; and that this case be remanded to the lower court for the purpose of assessing the damages according to the legal principles above established, the appellees paying the costs of this appeal.

EASTERN DIST.  
March, 1841.  
MUNICIPALITY  
NO. 2.  
vs.  
MUNICIPALITY  
NO. 1.

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**MUNICIPALITY NO. 2 vs. MUNICIPALITY NO. 1.**

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The city limits of New Orleans terminates at the outer edge of the levee, towards the river Mississippi, which is by law the bank of the river, and the line of division between the Municipalities consequently terminates there.

The direction of the wharves necessary to be built after the division of the city into Municipalities, is governed by different rules from the lines of division on shore. Each Municipality should construct the wharves within its limits at right angles to the levee, by running square into the river.

**EASTERN DIS.**  
**March, 1841.**

**MUNICIPALITY**  
**NO. 2.**

**VS.**  
**MUNICIPALITY**  
**NO. 1.**

So where the Municipality No. 1 extended its wharf at the division line diagonally into the river in the direction of the course of the dividing line on shore, it was ordered to be demolished, and the wharf to be made at right angles with the bank of the river.

This is an action by Municipality No. 2, to compel the first Municipality to change the direction of its wharf, built at the divisional line between the two Municipalities. The line of division running through the middle of Canal street, strikes the levee in an oblique direction, extending up the river, and by continuing the wharf in this direction it obstructs and impedes the first and second wharves built in the second Municipality. They pray that the defendants be required to take away the wharf from the line on which it was extended from the levee, and be forever enjoined from making it there, and from obstructing their wharves.

The defendants denied that they were encroaching on the second Municipality; but that they were within the corporate limits of their municipal jurisdiction; that the works and wharves they were erecting were essential to the public good; and those of the plaintiffs above are not accessible to the public in low water on account of the batture formed there. They aver that the works enjoined are absolutely necessary for the public convenience and use, and should be completed according to their plan; and that the injunction should be dissolved.

On these pleadings and issues the cause was tried by the court.

Several diagrams showing the formation of the bank of the river, the divisional line between the two Municipalities at the foot of Canal street, and also the projection of the new wharf of the defendants, running up the river athwart the first projected wharves of the second or upper municipality, were exhibited in evidence.

The sole question is, in what direction the wharves should be projected? The defendants contend that their upper or divisional wharf should project out and keep along with a prolon-

gation of the divisional line between the two municipalities into the river. The plaintiffs urge that the wharves ought to extend out at right angles with the bank or shore of the river.

The District Judge decided that the projected wharf and works of the defendants destroyed the old wharf of the plaintiffs, built, and now within their limits, before the division of the city; and, second, it obstructed the landing heretofore open between the two municipalities. There was judgment perpetuating the injunction, and that the defendants demolish or remove their wharf complained of so far as it departs from the line of the old wharf previously existing, at the division of the city in 1836. The defendants appealed.

*Rawle & Pierce*, for the plaintiffs and appellees.

*Roselius & Upton*, for the defendants.

*Bullard, J.* delivered the opinion of the court.

The second municipality of the city of New Orleans, obtained an injunction from the first District Court to restrain the first municipality from continuing the construction of a wharf extending from the levee into the bed of the river, and in such a direction as to render useless a wharf already existing and belonging to the plaintiffs, above the divisional line between the two municipalities. The plaintiffs pray that the wharf thus erected to their prejudice may be demolished and abated, and the defendants have appealed from a judgment in conformity to the prayer of the plaintiffs.

The line of division between the two municipalities runs through the centre of Canal street to the river, and the 11th section of the law dividing the city declares that "each of the aforesaid corporations shall have the exclusive right to make and enforce all public laws and regulations within their respective limits, and to regulate and at their own expense make all improvements to the streets, public squares, wharves, and other public property the use of which is now common."

EASTERN DIS.  
March, 1841.

MUNICIPALITY

NO. 2.

vs.

MUNICIPALITY

NO. 1.



EASTERN DIS.  
March, 1841.

MUNICIPALITY  
NO. 2.  
VS.  
MUNICIPALITY  
NO. 1.

The base of the wharf complained of is clearly within the limits of the first municipality, and it extends out into the river in the direction which the division line would take if prolonged beyond the outer edge of the levee. The question, therefore, which the case presents, is whether the first municipality has a right to run out the wharf in that direction, so as to mask and render useless a wharf above the line belonging to the second municipality and which existed before the division of the city.

The city of New Orleans does not embrace the river. The limits are declared by law to extend to the river, and this court held in the case of *Thompson vs. Blackwell*, that in designating boundaries, the word *to* without the word *inclusive*, exclude the object to which the line runs; 5 La. Rep., 465. The city therefore terminates at the outer edge of the levee, which is by law the bank of the river; La. Code, 448. The line of divi-

The city limits of New Orleans terminates at the outer edge of the levee towards the river Mississippi, which is by law the bank of the river, and the line of division between the municipalities consequently terminates there.

The direction of the wharves necessary to be built after the division of the city into municipalities, is governed by different rules from the lines of division on shore. Each municipality should construct the wharves within its limits at right angles to the levee, by running square into the river.

sion between the two municipalities consequently terminates there, and the direction from the levee into the river of wharves to be built after the division of the city is not necessarily governed by that line. The law therefore is silent as to the manner of constructing wharves, and does not require that they should run out into the river in any particular direction, and we must look elsewhere for a guide in this matter.

The law destines to public uses the bank of the Mississippi, and this use, so far as the port of New Orleans is concerned, is under the regulation of the three municipalities of the city, whose duty it is to provide and keep up wharves and other similar conveniences for the accommodation of commerce. The municipalities stretch along the curve of the river, and such a system ought to be adopted in the construction of wharves as to make every part of the bank accessible, if possible, and not to permit one to obstruct another. Each municipality is bound to administer in such a manner as not to interfere with the rights or duties of the others. The only reasonable method of solving such a problem is to construct all the wharves at right angles to the levee. They would then all

converge more or less to a common centre through the whole extent of the curvature of the bank. Such was the system adopted by the city authorities before the division, and no good reason has been given why it should be abandoned, especially at the point of separation between the two upper sections of the city, when from the course of the river it is manifest that a wharf carried out by the defendants in the same direction with Canal street, would render useless several wharves already existing in the upper municipality. That system was adopted after duly considering what would best suit the interests of commerce and facilitate navigation, as well as what would be most economical for the city.

The defendants contend that as the batture in front of the city continues to increase, it will be divided between the two municipalities by a continuation of the division line running through the centre of Canal street, and hence they infer the reasonableness of projecting the wharf in that direction, still parallel to that line and at a considerable distance from it. In what proportions any new alluvion may fall within the limits of the two municipalities it is not now necessary to enquire, but it appears to us that if a new levee should hereafter be formed further in the river, and the construction of new wharves should become necessary, it would still be just and proper that they should be perpendicular to the new levee. The fact that such a change would eventually give to the first municipality a larger segment of the curve, is very far from proving that they have now a right to anticipate such a change, and thereby defeat the right of the plaintiffs to enjoy a wharf already existing when the city was divided.

Upon the whole, we concur with the District Court in opinion, that the construction of the new wharf as contemplated by the defendants is a violation of the rights of the second municipality, and consequently that it ought to be demolished, and the injunction perpetuated.

EASTERN DIS.  
March, 1841.

MUNICIPALITY  
NO. 2.  
VS.  
MUNICIPALITY  
NO. 1.

So where the municipality No. 1 extended its wharf at the division line diagonally into the river in the direction of the course of the dividing line on shore, it was ordered to be demolished and the wharf to be made at right angles with the bank of the river.



**EASTERN DISTRICT,  
March, 1841.**

It is therefore ordered and decreed that the judgment of the District Court be affirmed with costs.

**PARISH  
vs.  
HOZEY, SHERIFF.**

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**PARISH vs. HOZEY, Sheriff.**

**APPEAL FROM THE COURT OF THE FIRST DISTRICT.**

The sheriff who sequesters property is bound to use the same exertions for its preservation as he would have done for himself; and to use such diligence as will secure it for the benefit of the party to whom it is ultimately adjudged.

So where a bill of exchange is sequestered, the sheriff is bound to see that it is presented for payment at maturity, and if not paid, to have it protested and due notice given to all the parties to it: otherwise he is liable for the amount.

This is an action to render the defendant liable to the plaintiff for the amount of a Bill of Exchange which was sequestered in the suit of Diggs, Hobson & Co. against him, but final judgment being rendered in his favor, the bill was ultimately decreed to be his property.

The plaintiff alleges and shows that during the time the bill was under sequestration in the hands of the sheriff who took it from the Canal Bank where it was deposited, he failed to present it for payment, or have it protested for non-payment so as to bind the parties to it. He further shows that the parties were solvent and that the bill would have been paid had proper diligence been used. He prays judgment for the sum of \$2000 in damages: the original amount of the bill being \$1450, and that the defendant be condemned to pay said sum.

The defendant denied that he was in any manner respon-

sible; but that he acted in his official capacity in taking into his custody said bill, and was bound to keep it safely and return it or hold it liable to the judgment of the court; and was bound in the meantime to keep and return the identical thing which had been placed in his hands.

EASTERN DIS.  
March, 1841.

PARISH  
VS.  
HOBBS, SHERIFF.

On these pleadings, issues and the facts disclosed, there was judgment for the plaintiff for the amount of the bill, and the defendant appealed.

*Payton*, for the plaintiff and appellee, urged the affirmance of the judgment with ten per cent. damages. The duty of the sheriff was plain and pointed out in the law. He was bound to keep the thing deposited and administer it with the same care that a prudent father of a family would attend to his own affairs. What man is there that would not have presented a bill in his hands for payment at maturity, and had it duly protested for non-payment. C. Pr. 283. La. Code, art. 2949, 2950, 2908.

*Upton*, for the defendant and appellant, contended that a sequestration was in the nature of a deposit. The sheriff was bound to keep safely and restore the precise object the identical thing. He did so in this case, and was strictly within the pale of his duty. La. Code, 2942, 2946.—See also articles 279 and 280 of the Code of Practice.

*Simon, J.* delivered the opinion of the court.

Defendant is appellant from a judgment which makes him liable and condemns him to pay to the plaintiff, the sum of \$1450 with interest, being the amount of a bill of exchange which, plaintiff alleges, having been sequestered before maturity, in the suit of Diggs, Hobson & Co. against the present plaintiff, was taken and removed by said defendant from the bank where it had been deposited for collection, and was held by him until after it was due and payable without making or causing to be made any demand of the acceptor at the time

**EASTERN DIS.** of its maturity, whereby the drawers and the endorsers were released from their liability.

**PARISH vs. HOZEN, SHERIFF.** Defendant denies his liability, and states that the act by which the plaintiff avers himself aggrieved was an official act of defendant's, done and performed by the express order of the court; that in compliance with the writ of sequestration issued and put into his hands, he took the bill of exchange into his possession and safe keeping, to hold the same subject to the order of the court. That it was his duty to keep the same and not to let it go out of his said possession, and that he was not to know and could not be presumed to know that its worth and value would be either increased, diminished or lost from the commission or omission of any judicial process or other steps connected therewith, &c.—He concludes by praying that the same judgment which, in case the court should be of a different opinion, would be rendered against him, be rendered against the persons who have signed the sequestration bond, and that they be cited accordingly as his warrantors.—There was judgment for the amount of the bill and interest against the defendant, and in his favor against his warrantors for the same amount; from which judgment, said defendant alone appealed.

The evidence shows that the bill of exchange, drawn on John B. Diggs by Pickett, Banks & Co., is dated the 17th of April, 1839, that it was made payable ninety days after date to the order of Keys and Roberts; that it was endorsed by the latter, by Diggs, Hobson & Co. and by plaintiff, and had been regularly accepted. That in conformity with a writ of sequestration issued in a suit instituted by the second endorsers against the plaintiff, the bill in question, was, on the fifth of July ensuing, received by defendant's deputy from the New Orleans Canal and Banking Company, where it had been deposited by plaintiff for collection, on the 27th of June preceeding. It is not disputed that a judgment was subsequently rendered in favor of said plaintiff decreeing the bill of

exchange to be his property, and that therefore he became fully entitled to recover the bill or the amount of its proceeds, if collected during the pendency of the suit.—Several witnesses have been examined to show that the drawers and endorsers of the bill were good and solvent at the time of its maturity, and this fact appears to have been satisfactorily established; it is also proven that the acceptor was insolvent when the testimony was given.

It is evident from the facts of the case, that the plaintiff, without any fault of his, has lost or been deprived of his recourse against the drawers and endorsers of the bill, and that he would vainly attempt a recovery from the acceptor. In this situation, he has thought proper to exercise his remedy against the sheriff, by a claim for damages; and the controversy in this case turns therefore entirely on the question whether the sheriff who is in possession of a bill of exchange under a writ of sequestration, is bound to take all the necessary steps which the law requires to fix the liability of the parties to the bill, so as to preserve its worth and value for the benefit of the successful party?

The appellant has endeavoured to resist the plaintiff's claim on the plea that being a judicial depository, one of his principal obligations was to restore *the precise object* which he received, *La. Code, art. 2915*; that such object could not be restored or parted with before the decision of the suit; *Idem art. 2946*; and that until then, he was bound, according to the terms of the writ, to keep the bill in his possession and to hold it subject to the further order of the court. He further urges that had he parted with the possession of said bill by delivering it to the acceptor, in case of payment at presentation, he would have been guilty of an act of disobedience to the positive order of the court.

It seems to us that the defendant has grossly mistaken or misapprehended the nature, extent, and importance of his obligations; and that his abundant caution and care to comply

EASTERN DISTRICT  
March, 1841.

PARISH  
OF  
HOKEY, SHERIFF.



**EASTERN DIS.** strictly with the literal and direct expressions of the writ  
**March, 1841.** under which he was acting, has been carried to such a degree

**PARISH** as to destroy the very object of the law. According to the  
**vs.**  
**MOSEY, SHERIFF.** art. 2908 of the La. Code, the depository is bound to use the

The sheriff same diligence in preserving the deposit, that he uses in pre-  
 who sequesters serving his own property; the same provision is contained in  
 property is art. 2949, and the art. 283 of the Code of Practice, says in  
 bound to use positive terms: that "*the sheriff, while he retains possession*  
 the same exertions for its of *sequestered property, is bound to take proper care of the*  
 preservation as he would have same, and to administer the same, if it be of such nature as  
 done for him- to admit of it, as a prudent father of a family administers  
 self; and to use his own affairs." It is thus perfectly clear that the defendant  
 such diligence was bound to use the same exertions in the preservation of the  
 as will secure it bill of exchange, as he would have done for himself, and such  
 for the benefit ultimately ad- diligence as would secure its recovery for the benefit of the  
 of the party to judged.

So where a party to whom it would be ultimately adjudged.—The sheriff  
 bill of exchange however intimates that he understood the law to mean that he  
 is sequestered, should keep the bill carefully in his pocket-book, and that had  
 the sheriff is bound to see it even been paid by the acceptor at maturity, he should have  
 that it is pre- considered himself bound to refuse the money, so as to be able  
 sented for pay- to produce the very same piece of property which had been  
 ment at matu- intrusted to his official care. This is indeed a very strange  
 rity, and if not defence, and if serious, such a construction of the law might  
 paid, to have it often be very mischievous in its consequences!—It is true that  
 protested and sheriffs are sometimes placed in a very delicate situation; that  
 due notice the duties they have to perform frequently compel them to  
 given to all the decide, at their peril, questions on which the best jurists  
 parties to it: would perhaps hesitate to pronounce positively; but the ap-  
 otherwise he is pellant must have known that if the defendant in sequestration  
 liable for the had offered him his obligation with one good and solvent  
 amount. surety, for an amount determined by the court to be equal to  
 the value of the property sequestered, such defendant would  
 have been entitled to take the bill out of the sheriff's posses-  
 sion, *C. of Pr. art. 279*; he must have been aware that the  
 importance and object of the sequestration was not in the

preservation of a mere worthless piece of paper; he must have understood that if, instead of representing the bill itself after the decision of the suit, he had produced its amount before the court, no one could have complained, as no injury being sustained, no blame could have been attached to his sparing to the party the trouble of collecting said amount, and that consequently no responsibility on his part could have ever resulted from such an act. The bill of exchange was nothing but the representative of a sum of money, it was put in the possession of the sheriff to prevent its being collected by the defendant in sequestration during the pendency of the action; and it is certainly obvious that in order to take proper care of it, as he would have done for himself, and to preserve its original value, the law made it his duty to have it presented for payment on the day of maturity, in order that, if not paid, such notice might be given to the drawers and endorsers as would fix and secure their subsequent liability. Having not done so, the defendant has been the cause of the plaintiff's sustaining a serious injury, and we do not hesitate to say that he is answerable for his negligence in not complying with one of his principal obligations; and that, in our opinion, the Judge *a quo* did not err in giving judgment against him for the amount of the bill of exchange.

It is therefore ordered, adjudged and decreed that the judgment of the District Court, be affirmed with costs.

EASTERN DISTRICT  
March, 1841.

PARISH  
vs.

MOORE, SHERIFF.



EASTERN DIS.  
March, 1841.

BACH vs. HERRING ET AL.

BACH  
vs.  
HERRING ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Judgment confirmed with maximum of damages.

This is a suit against the maker and endorser of a note.

There was no defence and judgment by default was taken and made final, and the defendants appealed.

*Latour*, for plaintiff, prayed the affirmance of the judgment with ten per cent. damages.

*Morphy, J.* delivered the opinion of the court.

This is an action against the drawer and endorser of a promissory note. After suffering below a judgment by default to go against them and be confirmed, the defendants have taken this appeal. As nothing has been offered in support of it, and the appellee has submitted his case with a prayer for damages:

It is ordered that the judgment of the District Court be affirmed with costs and ten per cent. damages.

PRITCHARD vs. FORGAY.

EASTERN Dis.  
March, 1841.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

PRITCHARD  
vs.  
FORGAY.

Where it is proved the note was protested and due notice given to the defendant, who is sued as endorser, the appeal will be considered as only for delay, and the judgment be affirmed with the maximum of damages.

This is a suit against the endorser of a promissory note.

The defendant admitted his signature and pleaded the general issue. It was proved that the note was duly protested for non-payment, and personal notice given to the defendant. From judgment against him he appealed.

*Larue*, for plaintiff, insisted on the affirmance of judgment, with ten per cent. damages.

*Simon, J.* delivered the opinion of the court.

This is a suit against several endorsers of a promissory note duly protested for non-payment. The defendant, Forgay, admitted his signature and pleaded the general issue; there was judgment against him in the court below, and he appealed.

The certificate of the notary proves that the protest of the note was regularly notified to the endorsers, and that notice of its dishonor was delivered to the defendant, Forgay, personally. It is evident that this appeal was taken only for delay, and the damages prayed for by the appellee must, therefore be allowed.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be affirmed with ten per cent. damages on the amount of the note sued on, and costs in both courts.

**EASTERN DIST. STAMPS vs. MARIGNY'S Attorney In Fact.**  
**March, 1841.**

**STAMPS**  
**VS.**  
**MARIGNY'S**  
**ATTORNEY IN**  
**FACT.**

**APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF**  
**NEW ORLEANS.**

Where the evidence sustained the judgment, and no amendment asked by the appellee, it was affirmed with costs.

The plaintiff claimed the sum of \$12,002, from the estate of the late Prosper Marigny, for the balance of the price of a tract of land, and an account annexed for advances and supplies, sold and furnished to the deceased, shortly before his death. The widow and heirs of Marigny and her second husband were made parties, and in their absence, they were cited through their attorney in fact N. B. Le Breton, who simply pleaded the general issue. After due proceedings and the production of a mass of evidence in support of the claim, the Judge of Probates gave judgment for \$10,000 only with interest. The defendant appealed.

*Grima*, for the plaintiff.

*F. Lavergne*, contra.

*Morphy, J.* delivered the opinion of the court.

The plaintiff claims of the estate of the late P. Marigny \$12,005 44, with interest thereon at the rate of eight per cent. per annum; 10,605 20 of this amount being for the price of a tract of land in Mississippi, which the deceased had purchased of him shortly before his death, and also \$1400 24, for sundries furnished and advances made to him as per a detailed account annexed to the petition.

The defendant, in his official capacity, filed a general denial. There was judgment below only for \$10,000, with interest at the rate of eight per cent. per annum, from the respective maturities of five notes drawn by the deceased in favor of the petitioner. Defendant appealed.

The evidence spread on the record before us fully sustains

the judgment of the Court of Probates, and the appellee has **EASTERN DIS.**  
not prayed that it should be amended in any respect. **April, 1844.**

It is therefore affirmed with costs.

**FORTIER**

**vs.**

**FIELD.**

**FORTIER vs. FIELD.**

**APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.**

Where the notary states he demanded payment of F. F., the attorney in fact of the drawer, the notary's statement is no evidence of the agency. It should have been proved on the trial like any other fact.

This is an action on a promissory note executed by C. F. Zippel and endorsed by the defendant. The latter pleaded a general denial.

The notary states in his protest that he "asked payment of F. Frey, the attorney in fact of the drawer of the note," &c.

On the trial the note and protest were offered in evidence. There was judgment for the plaintiff, and after an unsuccessful effort to obtain a new trial the defendant appealed.

*Labarre*, for the plaintiff, urged the affirmance of the judgment.

\* *Lockett & Micou*, for the appellant, insisted that the judgment should be reversed, for want of proof of the agency of Frey, of whom payment was demanded. Until there was evidence exhibited that Frey was agent no recovery could be had. The mere statement of the notary is no evidence of this agency. It was no part of his duty to show the agency.

*Morphy, J.* delivered the opinion of the court.

EASTERN DISTRICT  
April, 1841.

FORTIER  
VS.  
FIELD.

The defendant being sued as endorser of a promissory note drawn by C. F. Zimpel, pleaded the general issue. Judgment was given in favor of plaintiff, whereupon defendant moved for a new trial, which failing to obtain, he appealed.

The only evidence of a demand on the drawer is the declaration of the notary in the act of protest that he asked payment of the note of F. Frey, *the attorney in fact of the drawer*. The certified copy of the protest, made out in conformity with the act of 1827, proves only the demand itself and the manner and circumstances of such demand, but it is no evidence of extrinsic facts therein mentioned which form no part of official acts and doings of the notary. The agency of Frey should

Where the notary states he demanded payment of F. F., *the attorney in fact of the drawer*, the notary's statement is no evidence of the agency. It should have been proved on the trial like any other fact.

have been proved on the trial like any other fact. It cannot be considered as one of those circumstances accompanying the demand, which must necessarily be within the personal knowledge of the notary, and of which the act of protest must be taken as evidence under the statute. This deficiency in the proof was the ground upon which the motion for a new trial was made to the judge below, but it was overruled on the ground that defendant's answer contained no specific denial that Frey was the agent of Zimpel. It appears to us that a new trial should have been granted. The defendant was not bound to make any specific denial of a fact of which he was perhaps ignorant; and of which, under the general issue, he had a right to require proof.

It is therefore ordered that the judgment of the Parish Court be reversed, and that this case be remanded for a new trial, the appellee paying the costs of this appeal.



BEIRNE &amp; BURNSIDE vs. PATTON ET AL.

EASTERN Dist.  
April, 1841.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

BEIRNE  
& BURNSIDE  
vs.  
PATTON ET AL.

The general principle is, that contracts in regard to *personal* property must be regulated by the *lex loci* of the domicile of the owner. But as relates to the remedies of creditors, personal property has a *situs*, a locality, which subjects it to the law of the country where it is situated, when there is a conflict.

So an assignment made by debtors residing in Tennessee for the benefit of their creditors, of certain cotton in New Orleans, which is void under our laws, will not have effect as against an attaching creditor here, who is no party to it.

Where a contract is either expressly or tacitly to be performed in another place than that where it is made, it is to be governed by the law of the place of performance.

This suit commenced by attachment. On the 5th of May, 1840, the plaintiffs instituted suit on two promissory notes of A. Patton & Co., who are alleged to be residents of Tennessee, and attached 138 bales of cotton, and a hogshead of tobacco, in the hands of Maunsel, White & Co., of New Orleans.

On the 25th November, 1840, James Vaultx and Wm. Butler, residing at Jackson, Tennessee, intervened as the trustees of A. Patton and W. Taylor, defendants in this suit, lately trading under the firm of A. Patton & Co., in Tennessee, stating that the property attached with other property, had been assigned to these intervenors as trustees for the benefit of the creditors of said firm. The deed of trust, was annexed to the petition of intervention, dated the 3d April, 1840. It embraced in the assignment the property attached. The creditors were classed; part of whom were to be paid in full, and the remainder *pro rata*. The intervenors claimed to be put in possession of the cotton or its proceeds under the deed of trust.

The garnishees were interrogated and stated that the cotton was shipped to them, and they had notice of the assignment in Tennessee, *previous to levying the attachment*.

The plaintiffs are citizens of and doing business in Louisiana and the notes sued on were executed and payable here.

66 106 013  
7m 69.8m 95  
11m 730  
12m 475  
1 N.S. 202  
5 N.S. 569  
6 N.S. 76,830  
6 N.S. 607  
7 N.S. 110,408  
8 N.S. 21  
12m 248  
112m 16,476  
172m 549  
2 N.S. 258  
3 N.S. 361  
3 N.S. 89.



EASTERN DIS. There was judgment in favor of the plaintiffs; and also  
April, 1841. against the intervenors with costs. They appealed.

BEIRNE  
& BURNSIDE *Elmore & King*, for the plaintiffs and appellees, argued the  
VS.  
PATTON ET AL. case in writing.

*F. B. Conrad*, for the intervenors and appellants, insisted on the reversal of the judgment and argued in support of the validity of the assignment, and its binding effect on the property found here and attached.

*Morphy, J.* delivered the opinion of the court.

This is an appeal from a judgment rendered on an intervention of Vaulx and Butler, residents of Tennessee, who claim as trustees 138 bales of cotton, attached in this suit as the property of defendants. Judgment was given in favor of the plaintiffs and the intervenors appealed.

They claim under a deed of trust executed in Tennessee by defendants for the benefit of their creditors; by this instrument bearing date the 3d of April, 1840, the defendants convey, make over, assign, &c., to Vaulx and Butler certain property therein described, and among the rest, "*138 bales of cotton and one hogshead of tobacco shipped to Maunsel White & Co., of New Orleans, or if sold the proceeds thereof;*" they divide their creditors into seven classes; those of the six first classes are to be paid in full and those of the seventh and last class are to be paid *pro rata* out of the residue of the assets in the hands of the trustees. The record shows that the garnishees had notice of this assignment and agreed to hold the property subject to the order of the assignees previous to the levying of plaintiff's attachment. Had this assignment been an ordinary and absolute bona fide transfer of property in the usual course of business, the right of the interpleaders to recover could hardly be questioned, but we are called upon to give effect to a contract affecting property within this State to the prejudice of its citizens, when by our laws such a contract, if executed here,

would be void as made in fraud of creditors. That this assignment was made by defendants in prospect or under circumstances of insolvency, and with a view to distribute their property among some favored creditors according to a plan dictated by themselves, is apparent from the instrument itself. There is no legal evidence before us that such an assignment would be valid by the laws of Tennessee; it would surely be repudiated by the laws of this State, which hold that the property of a debtor is the common pledge of his creditors, and which declare it a fraud in a debtor to give preferences to some creditors over the others. But supposing, as it is asserted, that this contract is perfectly valid in Tennessee and binding on the creditors and property there, it does not follow that it is to be received and enforced in this State to the injury of creditors, who are our own citizens. While we recognize the principle that all contracts in regard to personal property must be regulated by the *lex loci* of the domicile of the owner, we hold that as relates to the rights and remedies of creditors, personal property has a *situs* or locality; and is to be governed by the law of the country where it is situated, when there arises a conflict between the latter and the former. The principle of comity cannot require of us that we should enforce on property here, to the prejudice of our citizens, a contract void under our system of jurisprudence. It would be giving unjust advantages to foreign creditors over our own in direct violation of our law. In relation to property within our jurisdiction, we cannot withhold from suitors their legal remedies, or suffer their rights to be controled or their interests injured by acts of their debtors abroad, not assented to by them and reprobated by our laws. To do this would be, as we have said on a former occasion, to sacrifice justice to courtesy; 2 Martin, N. S., 93, *Olivier vs. Townes*; Story's *Conflict of Laws*, page 203; 2 Kent's *Commentaries*, page 461. It does not clearly appear from the evidence at what precise time the cotton reached this State; we should conclude from it, however, that

EASTERN DIS.  
April, 1841.

BEIRNE  
& BURNSIDE  
VS.  
PATTON ET AL.

The general principle is, that contracts in regard to *personal* property must be regulated by the *lex loci* of the domicile of the owner. But as relates to the remedies of creditors, personal property has a *situs*, a locality, which subjects it to the law of the country where it is situated, when there is a conflict.

So an assignment made by debtors residing in Tennessee for the benefit of their creditors, of a certain cotton in New Orleans, which is void under our laws, will not have effect as against an attaching creditor here, who is no party to it.

EASTERN DIS.  
April, 1841.

BEIRNE  
& BURNSIDE  
vs.  
PATTON ET AL.

Where a contract is either expressly or tacitly to be performed in another place than where it is made it is to be governed by the law of the place of performance.

it was here even at the date of the deed of trust; at all events it had been received in New Orleans by Maunsel White & Co. before they were notified of the transfer. Moreover from the very terms of the instrument itself it was in the contemplation of the parties to have its effect in this State so far as relates to the property in dispute. It is a well settled rule that where a contract is either expressly or tacitly to be performed in another place than that where it is made, its validity is to be governed by the law of the place of performance; Story's Conflict, p. 233; 2 Kent's Com., pp. 393, 459; Boullenois, quest. contr. des lois, p. 330. This assignment, then, being by our laws void and without effect, as to plaintiffs, the property attached is as to them yet in defendants. These assignees have acquired by the deed no title in themselves; they might be viewed as the mere agents of defendants to distribute the property according to their instructions; as long as this distribution has not taken place, the plaintiffs who are no parties to the deed are not bound by it, and may legally enforce their claims on such part of the property of their debtor as they find within the State. A case strongly analogous to that before us is to be found in 13 Massachusetts Rep., p. 146, Ingraham vs. Geyer. It has been held that a voluntary assignment by a debtor of all his property made in Pennsylvania for the benefit of creditors shall not prevail over a subsequent attachment of funds of the debtor, and the ground taken there is that such an assignment would have been void by the laws of Massachusetts if made in that State.

There is, besides, in this assignment a feature which would make us doubt of its validity even by the laws of the country where it was made. It does not purport to convey all the property of the defendants, although they profess to make the transfer for the discharge of all their debts. The property assigned is specified, but no declaration is made that the assignors possess no other; on the contrary one of the clauses of the deed discloses the existence of a valuable tract of land not

mentioned in it, and in which A. Patton, one of the assignors, EASTERN DIST.  
had at least a residuary interest; see 13 La. Rep., 456, Graves April, 1841.  
et al. vs. Roy; see also the authorities there quoted. BORGSTED & CO.

The judgment of the District Court is therefore affirmed vs.  
with costs. NOLAN ET AL.

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**BORGSTED & CO., vs. NOLAN ET AL.**

**APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.**

After the promulgation of the act abolishing imprisonment for debt *no ca. sa.* could issue; and all process against the body of the debtor being gone, the *liability of the bail ceased*; as he had no longer the power of keeping or surrendering the principal debtor.

The plaintiffs having arrested the defendant, Nolan, and held him to bail, obtained judgment against him for the amount of their demand, issued execution the 6th May, 1840, which was returned the 10th June following, no property found.

Before judgment, to wit: on the 16th April, 1840, the act abolishing imprisonment for debt was promulgated. No writ of *capias ad satisfaciendum* could issue, the plaintiffs took a rule on the defendant's bail, to make him liable for the debt on the bail bond; alleging that the defendant had departed from the State contrary to the condition of the bail bond, which was now forfeited and the bail liable.

After hearing the parties the rule was discharged; the presiding judge being of opinion, inasmuch as no *ca. sa.* had issued, the plaintiffs could not recover from the surety on the bail bond. The plaintiffs appealed.

*Bartlette*, for the plaintiffs.

*Larue*, contra.



EASTERN DIS.  
April, 1841.

BOORAEM  
vs.  
MERRIFIELD.

*Morphy, J.* delivered the opinion of the court.

The plaintiffs are appellants from an order discharging a rule taken by them on W. S. Brown, to obtain judgment against him as surety of defendant on a bail bond. The record shows that no writ of *capias ad satisfaciendum* was issued or could have issued, because a *feri facias* taken out in the case was returned only on the 6th of May, 1840, after the promulgation of

After the promulgation of the act abolishing imprisonment for debt no *ca. sa.* could issue; and all process against the body of the debtor being gone, the liability of the bail ceased; as he had no longer the power of keeping or surrendering the principal debtor.

the act of assembly abolishing imprisonment for debt. Plaintiffs' right to any writ or process against the body of defendant being gone, it is clear that the liability of the bail ceased, because he had no longer the power of keeping defendant, and could not surrender him. The evidence relied on to show that the condition of the bond was broken by defendant's leaving the State in the meantime cannot avail plaintiffs, because the liability of the bail was not fixed by the departure of the debtor; but for the law above mentioned, the bail could have surrendered him at any time before judgment was rendered against himself, and his obligation was only to present the defendant on execution of the definitive judgment in the suit; C. Pr., arts. 230, 231, 235; 8 Martin, N. S., p. 129; acts of 1840, p. 131.

The judgment of the Commercial Court is therefore affirmed with costs.

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BOORAEM vs. MERRIFIELD.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

Parol evidence is admissible to show by the practice and laws of another state, it is not necessary to present a note for payment, at the place designated therein in order to maintain an action against the maker.

It is only the written or statute laws of a state, that cannot be proved by parol, a certified copy is the best evidence.

This is an action against the defendant as one of the makers

of a promissory note, payable at the Branch of the Planters Bank at Port Gibson, Mississippi. There was a general demurrer pleaded.

A bill of exception was taken to the admission of testimonial proof, or parol evidence of the laws of Mississippi, in relation to demand of notes at the place where made payable in order to recover against the maker. The proof was offered to show that this was not necessary in Mississippi.

The plaintiff had judgment, and the defendant appealed.

*Wharton*, for plaintiff.

*C. M. Jones*, contra.

*Morphy, J.* delivered the opinion of the court.

This suit is brought on a promissory note of defendant, payable to the order of the plaintiffs, drawn in the State of Mississippi, and made payable at the branch of the Planters Bank at Port Gibson. The general issue was pleaded. On the trial, a witness was offered to prove that by the laws of Mississippi, where the note was made payable, it is not necessary to present it for payment at the place designated therein, in order to maintain an action against the drawer. This testimony was objected to on the ground that the laws of a State cannot be proved by parol. It was, in our opinion, rightly admitted, for the objection was well founded only in relation to written laws, and the judge was not to presume without any evidence of the fact, that the laws offered to be thus proved were part of the statute law, or *lex scripta* of the State of Mississippi, where the common law is shown to prevail; (see the late case of *Wetmore vs. Merrifield*, ante, 513).

The judgment of the Commercial Court is therefore affirmed with costs.



EASTERN DISTRICT

April, 1841.

BERNARD,  
SYNDIC, &c.  
vs.  
DUFOUR.

BERNARD, Syndic, &amp;c. vs. DUFOUR.\*

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

Real estate or immovable property although purchased in the name of a firm, becomes the *joint* property of the individuals composing the firm and not partnership property liable first to the partnership debts.

Where real estate is paid for with partnership funds, it creates an individual indebtedness of the partner to the *firm*, but the partnership does not thereby become the owner; or confer on the creditors of the firm any right or privilege on its proceeds, in preference to individual creditors.

The individual share or interest of a partner in real estate will form a fund in the hands of his syndic, liable to the claims of all his creditors without distinction.

Partnership creditors are privileged over individual ones, on the partnership effect; but the latter have no such preference over the former on the separate and individual property surrendered by the insolvent member of a firm.

The liquidating partner of a firm has no right to dispose of and control the undivided interest of the other partner in real property owned jointly.

The plaintiff having been appointed syndic of the creditors of Hypolite Paloc, alleges that he and Charles Dufour became joint purchasers of a piece of ground on the corner of Dumaine and Burgundy streets, in New-Orleans, on which they had erected six houses; that although the said H. Paloc and C. Dufour were commercial partners, transacting business under the firm and style of Paloc & Dufour, yet these houses and lots were not partnership property, but one undivided half thereof belongs to said Paloc as joint owner, and he having failed, it has become necessary to sell his undivided share therein for the benefit of his creditors. He prays that Dufour be cited and that the said houses and lots be sold jointly by the said Dufour, and this petitioner representing the creditors of Paloc and the proceeds of sale equally divided between them.

\*This case was decided the 13th April, 1840. The court was then composed of Judges MARTIN, BULLARD and MORPHY. It was suspended by an application for a re-hearing, and has never become final. But from the important principles it contains in relation to *partnerships*, it has been deemed advisable to publish it for the benefit of the profession, although it cannot be referred to as *stare decises*.

Dufour answered as liquidating partner, and after pleading the general issue, averred that the property in question had all been paid with the partnership funds, and that the creditors of the partnership should be preferred and paid in preference to other persons. He denies any right or authority of the syndic to intermeddle with this property or any of the affairs of the partnership; until all the creditors thereof are paid and satisfied: and that he as liquidating partner has the sole right to settle the affairs of said firm. He prays that the petition be dismissed.

EASTERN Dis.  
April, 1841.

BERNARD,  
SYNDIC, &c.  
vs.  
DUFOUR.

Upon these pleadings and issues the cause was tried.

The defendant offered evidence to show that this property was purchased entirely with partnership funds and the buildings erected thereon with the same; and that it or its proceeds belonged exclusively to the partnership.

It appeared that the deeds of sale were taken in the names of the two partners, each for one undivided half.

There was judgment for the defendant, and dismissing the plaintiff's petition, from which he appealed.

This case was argued by brief.

*J. Seghers*, for the plaintiff and appellant.

*Canon*, for the appellee.

*Morphy, J.* delivered the opinion of the court.

Hypolite Paloc, a member of the commercial firm of H. Paloc & Dufour, having absconded some time in 1839, proceedings were instituted against him by his creditors under the act of 1826, for a forced surrender, and a syndic was appointed. This suit is brought by the latter to obtain the partition and sale of six houses and lots, alleged to have been held in common between the insolvent and this defendant. The latter, styling himself the liquidating partner of the late firm of H. Paloc & Dufour, claims the exclusive right of selling all

EASTERN DISTRICT  
April, 1841.

BERNARD,  
SYNDIC, &c.  
vs.  
DUFOUR.

this property in his said capacity. He avers that the lots and houses mentioned in plaintiff's petition were paid for with partnership funds and belong to the partnership; that the creditors of the firm are to be paid out of the proceeds of this property in preference to the individual creditors of Paloc, and that plaintiff in his capacity is entitled to receive only the surplus of said proceeds, remaining after the payment of all the creditors of the firm. He prays that his right be recognized to sell this property and to receive all the proceeds thereof in order to liquidate the affairs of the firm.

The only question presented for our solution is, whether this property belonged to the firm of Paloc & Dufour, or to the two partners jointly and in their individual capacity.

The documentary evidence in the record shows that Hypolite Paloc and Charles Dufour became joint purchasers, each for one undivided moiety of a parcel of ground situated at the corner of Dumaine and Burgundy streets, on which they caused the said six houses to be erected. The Louisiana Code, article 2777, provides, that "a community of property does not of itself create a partnership however that property may be acquired; whether by purchase, donation, accession, inheritance or prescription." If the parties had contemplated making in relation to this property an ordinary and particular partnership, they would no doubt have reduced it to writing and had it recorded, pursuant to article 2807 of the same code. Can these lots be said to have become the property of the commercial partnership which at that time existed between these purchasers? It is clear that they did not nor was it intended by the parties that they should, for the purchase was expressly made in the private names of the two partners. In their articles of co-partnership we find a clause which it was useless to insert, under our laws, but which shows the intention of the partners. It is in the following words: "*dans les mots opérations commerciales nous ne comprenons pas les achats de maisons, terrains ou esclaves, à moins de*

convention ultérieure." No such subsequent stipulation is shown, and if it was, we would disregard it, as being made in open violation of our laws, which do not allow commercial partnerships to deal in landed property; La. Code, art. 2796. Had these lots been bought in the name of the firm, they would have been joint, not partnership property; 3 La. Rep. 404, Skillman vs. Parnell et al. But it is urged by defendant's counsel, that these lots and houses having been almost entirely paid with partnership funds, the creditors of the firm of Paloc & Dufour are entitled to be paid in the proceeds of it in preference to those of the individual partners; that the syndic appointed by the separate creditors of Paloc, has no right to intermeddle with the property belonging to the creditors of the firm, that he is not their agent, and has not given security according to the act of 1837.

All these pretensions are predicated on the idea that the loan or advance of funds made by the firm to the individual partners to pay for or improve the lots thus purchased, transferred them in full property to the firm, and thus rendered them liable to the preference accorded by article 2794 of the La. Code, to the creditors of a partnership on partnership effects, over the separate creditors of each partner. But it is clear that admitting these payments to have been made by the firm, as attempted to be shown by extracts from the partnership books, they created an individual indebtedness of the partners towards the firm, but could by no means render the firm owner of the property thus paid for, or improved; nor do they confer on the firm or its creditors any privilege on the proceeds of the property.

Paloc having failed, in contemplation of law, the proceeds of his undivided share in the property will form in the hands of the syndic a fund liable to the claims of all his creditors without distinction; for although by article 2794, the partnership creditors are privileged over the separate ones on the partnership effects, the latter have no such preference over the former on the separate and individual property surrendered by the in-

EASTERN DISTRICT  
April, 1841.

BENARD,  
SYNDIC, &c.  
vs.

DUFOUR.

Real estate or immoveable property although purchased in the name of a firm, becomes the joint property of the individuals composing the firm, and not partnership property, liable first to the partnership debts.

Where real estate is paid for with partnership funds, it creates an individual indebtedness of the partners to the firm, but the partnership does not thereby become the owner; or confer on the creditors of the firm any right or privilege on its proceeds, in preference to individual creditors.

The undivided share or interest of a partner in real estate will form a fund in the hands of his syndic, liable to the claims of all his creditors without distinction.



EASTERN DIS.  
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Partnership  
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dered by the  
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ber of a firm.

The liquidat-  
ing partner of a  
firm has no  
right to dispose  
of and control  
the undivided  
interest of the  
other partner in  
real property  
owned jointly.

solvent member of a firm; 8 Martin, N. S., 600, Morgan vs. his creditors. Nothing then prevented the creditors of the firm from appearing at the meeting before the notary and opposing the unanimous vote by which this syndic was dispensed with giving security. Admitting defendant's right to manage and liquidate, alone and without control, the affairs of the firm, after its dissolution by the failure of Paloc, which right it is not necessary to question in this case, it by no means follows that he has also that of disposing of the separate property of his partner, although the latter may be indebted to the firm. If he had such right, he would have more power after the dissolution of the partnership than he had before; for neither partner could have disposed of the whole property without the consent of the other. The only right which each of the joint owners had in relation to the sale of this property, in case of a disagreement was to ask for a partition. This right which was in Paloc has passed to his creditors by the forced surrender, and is now properly sought to be exercised by their legal representative.

It is therefore ordered that the judgment of the Parish Court be annulled and reversed; and this court now proceeding to render such judgment as in their opinion should have been given below, do order and decree that the property described in plaintiff's petition be sold at such terms and conditions as have been fixed by the creditors of Paloc for his share in said property, and also at such terms and conditions as defendant may fix for his share in the same; the proceeds of the sale to be equally divided between plaintiff in his capacity of syndic and defendant; and the costs of this appeal to be borne by the defendant and appellee.

# INDEX

OF THE

## PRINCIPAL MATTERS.

### ACTION.

PAGE.

1. In an action on a contract and on a *tort*, against several defendants, they will be allowed to sever in their defence and trial; even co-trespassers may plead and be tried separately; *a fortiori* when one defendant is sued on a contract and the other on a *tort*. . . . . *Arrowsmith vs. Mayor et al.* 419
2. When title in third persons is sought to be divested on the ground of fraud or simulation, recourse must be had to a direct *action* of revocation, when the parties are entitled to a jury. . . . . *Samory vs. Hebrard et al.* 553
3. The proceedings under the 13th section of the act of 1839, is intended to get at property in the possession of third persons belonging to the defendant, but cannot be substituted for the *revocatory action*. . . . . *ib.*

### ADMINISTRATOR.

1. A succession in the possession of the widow and tutrix of the minor children owing debts, must be administered as an entire thing for the advantage of the creditors, as well as beneficiary heirs entitled to the residue after payment of the debts, and the law requires that an administrator shall be appointed in all such cases, who must give security. . . . . *Jacobs tutrix; &c. vs. Tricon et al.* 104
2. So a tutrix cannot administer a succession in virtue of her office as tutrix of the minor heirs without giving good security, as is required of other administrators. . . . . *ib.*

### AFFIDAVIT.

1. Where the petition alleges "the defendant is taking off his crop," and the affidavit declares all the facts in the petition "to be true;" "that the defendant is reputed insolvent and unable to pay his debts," it is sufficient to support a sequestration of the crop. . . . . *Neilson vs. Pool.* 909



2. An affidavit which declares that the facts in the petition, stated, "as within his knowledge are true, and those not so stated he believes to be true," is sufficient to maintain an injunction; but it should be distinctly stated in the petition the facts which are within his knowledge, and those which he has only reason to believe. *Schuber vs. Bosgereau*. 174
3. It may be shown by affidavit in this court that the matter in dispute exceeds 300 dollars and gives jurisdiction. *Perkins vs. Nettles's administrator*. 233
4. An affidavit stating that all the material allegations in the foregoing petition are *just and true* and that the facts are such as in the opinion of the affiant authorise the issue of an injunction, is insufficient to support the injunction. *Boatner vs. Walker et al* 461

## ALIENS.

1. The capacity of Aliens to transmit estates *ab intestato* and to inherit from others in Louisiana is granted, and there is nothing in the laws of this State that excludes aliens from the inheritance of any kind of property. *Duke of Richmond vs. Milne's Executors et al* 312
2. The incapacity of Aliens by the English and Scotch laws is only extended to their *holding lands*, or acquiring heritage either by purchase or succession. 46
3. Under the laws of Scotland an Alien may acquire property in goods, money and moveable estate; make a Will, and sue for personal debts. In England he may be a mortgagee and recover his debt, where there is a positive prohibition against holding lands. 46

## APPEAL.

1. Under the act of 20th March, 1839, "amending the Code of Practice," errors and irregularities in taking up an appeal will be cured by allowing time, when not occasioned by the fault of the appellant. *Desorme's heirs vs. Desorme's syndic*. 111
2. The 1042d article of the Code of Practice directs the testimony of witnesses in causes tried before the court of probates to be taken down in writing by the Judge and annexed to the record; also a list of the documents filed by the parties that they may be read on the appeal, and when this not done the case will be remanded at cost of the appellee. 46
3. The act of March 20th, 1839, section 19, forbids the dismissal of appeals on the ground of not being made returnable to the next term, when it does not appear the fault or neglect was imputable to the appellant. *Perkins vs. Nettles's administrator*. 233
4. When Judges are required by law to alternate in holding courts in their districts, either may grant an appeal from a judgment of the other. 46
5. But where one of several defendants in a judgment of partition, appeals he must make all his co-defendants appellees or parties, as well as the plaintiff, or the appeal will be dismissed. *Farrar vs. Newport et al* 346
6. No appeal lies from a decision of the court referring a case of boundary back to the surveyors appointed, with instructions to search for and run out a particular boundary line referred to: *Zeringue vs. Harang's administrator*. 340

7. Appeal dismissed; the certificate of the clerk not stating that the record contained all the evidence adduced on the trial. *Marsh vs. Barnes & Tilghman.* 27

8. There was judgment by default and no attempt to show error on the appeal, judgment was affirmed with damages, as a delay case. *Avart vs. Banks.* 69

9. Appeal taken to a return day which is changed by law to a more distant day, and the record is not filed on the first, but on the last return day, it will not be considered as abandoned but as filed in proper time. *Reynolds, Byrne & Co. vs. Feliciana Steam-boat Company.* 397

10. A suspensive appeal does not lie from a judgment removing a tutor and appointing another in his place, as the minor would be without a protector during the pendency of the appeal. *State vs. Judge of Probates of New-Orleans.* 432

11. A motion to dismiss, after an appeal has been pending more than 3 years, and since the passage of the act of 1839, comes too late and will be overruled, to allow further time to correct all errors. *Police Jury of St. Helena vs. Flucker, administrator.* 465

12. When none of the errors in bringing up an appeal are imputable to the appellant, he will be allowed further time to correct such errors. *ib.*

13. Where ample time is allowed to make the necessary party, on a suggestion of the death of the original defendant, and no steps are taken the appeal will be dismissed. *Bell to use of McMicken vs. Mix, administrator.* 467

14. A return that an appellee "was absent from the state," is insufficient to authorize service on the attorney; *non constat*, that his absence was temporary or permanent. *Comstock et al. vs. Paie & Smith.* 515

15. Irregularities in service of citation do not authorize the dismissal of the appeal. *ib.*

16. When an appeal appears to be taken solely for delay, judgment will be affirmed with the maximum of damages. *Cantrelle et al. vs. Percy.* 520

17. Where a party at the suggestion of the court submits to a non-suit, on a tender allowing him the faculty to have it set aside, if he is aggrieved by the decision, refusing to set it aside, he can appeal. *Foley vs. Dufour et al.* 521

18. Where due notice of a protest was given to the defendant, who is sued as endorser, the appeal will be considered as only for delay, and the judgment affirmed with the maximum of damages. *Pritchard vs. Forgay.* 585

## ARBITRATORS AND AMICABLE COMPOUNDERS.

1. When all matters in the pleadings are submitted to amicable compounders, that they should pass upon and settle all accounts between the parties, their award, when there has been no fraud and misconduct or extreme partiality, will be made the judgment of the court, without revision or alteration.

*Canty vs. Beal.* 282

## ASSIGNMENT AND TRANSFER.

1. An assignment made by a debtor for the benefit of such creditors as become parties to it, and declared null as to those not parties, does not prevent a creditor

who signed; from suing and recovering his debt, and to be paid out of the funds in the hands of the assignee or agent of the creditors, *pro rata* with others.

*Underhill et al. vs. Townsend & Jones.* 517

2. There is no particular form of assignment required in the transfer of a debt. It is sufficient if knowledge of the transfer is brought home to the debtor, and that he knew his former creditor was divested of his rights to the debt assigned, and that such knowledge of the fact was derived from the transferrer or his agent.

*Gillett vs. Landis et al.* 470

3. The holder of notes transferred to a third person, giving them up to the transferrer improperly, will be liable to the transferee only for their value, at the time of the transfer. . . . . *ib.*

4. A subsequent transfer of notes with notice and delivery, will hold good against a prior pledge and transfer by notarial act, without actual delivery, although due notice had been given. . . . . *Winchester vs. Ory's syndics.* 423

### ATTACHMENT.

1. Where no property of an absent defendant has been seized in a suit by attachment, no judgment can be rendered against him, and the attachment will be set aside. . . . . *Oliver vs. Gwin.* 21

2. When the plaintiff in attachment points out persons in whose hands he expects to find property of his debtor and makes them garnishees, and they by their answers show there is none, the suit cannot be maintained. . . . . *ib.*

3. The seizure of any property however small, will support an attachment; and the attachment extends to every species of property: to all rights and credits and to partnership property, in a suit against one of the members of a firm. . . . . *ib.*

4. Where garnishees intervene, claim and bond the property attached, on the ground that it belongs to them, it is no appearance in court, on the part of the defendant in attachment and cannot give jurisdiction. . . . . *ib.*

5. The statute law of Mississippi authorizes defendants in attachment, for debts not due, to give bond with security for the payment of the debt at maturity, which is binding on the principal and surety, without any judgment having been first obtained by the creditor against his debtor, for the amount of his demand.

*Church et al. vs. Henry.* 70

6. An attachment bond for a sum exceeding by one half that claimed, must be given with one good and solvent surety, residing within the jurisdiction of the court, sufficient to answer for the amount of the obligation before a writ of attachment can issue. . . . . *Jackson, Riddle & Co. vs. Warwick.* 436

7. If it appears the surety is not worth the full amount of the attachment bond, although he may be fully able to answer to the amount of property actually attached, the attachment will be set aside. . . . . *ib.*

### ATTORNEY OF ABSENT HEIRS.

1. An attorney of absent heirs, or a defensor appointed by the court to defend the rights of absentees, in a suit against them, ought not to be permitted to surrender any lawful means of defence on their part, to the injury of those he represents.

*Collins vs. Pease's Heirs.* 116

2. And where from want of skill or inexcusable neglect on the part of a defensor, by consenting to the introduction of improper testimony in favor of the adverse party, &c., it will form a proper case for the application of the law, authorising this court to remand causes to be tried *de novo*, when in its opinion justice requires such a measure. . . . . *ib.*

### ATTORNEY AT LAW.

1. Attorney's fees are sometimes allowed as special damages on the dissolution of an injunction wrongfully sued out, as a punishment for the unjustifiable resort to this as a means of delay to defeat the ends of justice. . . . *Smith vs. Bradford.* 263

2. In a suit for professional services as attorney at law when no other services were rendered than aiding to draw a petition in a suit which is afterwards abandoned; the verdict of a jury disallowing the plaintiff's demand was not disturbed. *Haralson vs. Camp et al.* 267

### ATTORNEY IN FACT.

1. The Louisiana Code requires express and special power to be given whenever the things to be done are not mere acts of administration. *Gaiennie vs. Akin's Executor et al.* 42

2. A tutrix may appoint an attorney in fact to carry into effect any act of sale which she could legally execute. *Hardy, Superior of Convent of Sacré Cœur vs. Landry's Heirs.* 191

### BAIL AND BAIL BONDS.

1. A return by the sheriff, that he "seized in the hands of W. B. all the rights, credits, &c., and property of every kind which he might have in his possession or under his control, belonging to the defendant, sufficient to satisfy the writ of *feri facias*, of which seizure nothing came into his hands; no other property found;" is insufficient to authorize the issuing of a *capias ad satisfaciendum*. *Conway vs. Jones et al.* 413

2. It is required before a *capias* issues, that demand shall be made by the sheriff of the parties, first of the defendant and then of the judgment creditor, to point out property, and all in vain. . . . . *ib.*

3. To enable the judgment creditor to proceed against the surety in a bail bond, or against bail, the sheriff's return on the *feri facias* must state that he found no property to seize, notwithstanding the demand made of the parties. . . . . *ib.*

4. Proceedings on bail bonds when the sureties are sought to be made liable are to be tried summarily and without the intervention of a jury. *Weyman & Thorn vs. Cater & Cropp.* 529

5. So, sureties in a bail bond have the right to proceed by rule, taken on the adverse party, to show cause why the bond should not be cancelled, and the sureties discharged. . . . . *ib.*

6. Whenever a question arises out of a bail bond, either to enforce its payment or to destroy the surety's liability, such question is incidental to the main action, and may be tried summarily without a new suit. . . . . *ib.*



## BILLS AND NOTES.

1. Where a note is deposited as collateral security, or pledged after *it is due*, it is subject in the hands of the depositor, to all equitable offsets, which the maker had against the original payee or holder, or which he may have until he receive notice of the transfer..... *Lapice vs. Clifton.* 152

2. As a general rule the endorsement and delivery of a promissory note transfers the property in it; but it is not every deposit and endorsement of a note as collateral security, that transfers such absolute property as will deprive the payee or depositor of all right, and the maker of every defence, he may have against it previous to notice of the deposit or pledge..... *ib.*

3. The endorsee of a draft, though only agent, may maintain an action in his own name, but it will be liable to the equities of the defendant against the real owner.. *ib.*

4. So the transfer of a note before maturity under circumstances calculated to excite a reasonable suspicion in the endorsee of legal or equitable defences on the part of the maker, will not preclude evidence of such equities or defences in an action by the endorsee..... *ib.*

5. A note must be transferred in good faith, in the ordinary course of business, before maturity, and without any circumstances to induce a reasonable belief of the existence of such equities or defence to preclude evidence of them by the maker..... *ib.*

6. Demand of the maker of a note at *his domicile*, if he is absent, or at the place where it is made payable, when one is designated, is *indispensable* to fix or bind the endorser. The notary must in such cases find out the domicile.

*Oakey et al. vs. Bank of Louisiana et al.* 386

7. A delay in giving notice to an endorser, occasioned by the irregularities of the post office, through which it was transmitted, will not injure the plaintiff's right to recover..... *Peyroux et al. vs. Davis.* 479

8. A notary will not be permitted to alter his record of the protest and notice to endorsers, by interlining and inserting the manner or circumstances of giving notice which he or his clerk may have omitted..... *ib.*

9. The endorser cannot object to proof showing the signature of the maker was erased through error, when he has not set up this in his defence; although this circumstance was not alleged in the petition..... *Cantrelle et al. vs. Percy.* 520

10. Proof of the defendant's signature as acceptor, and also of the payee of a bill, when the general issue is pleaded and the signatures of the acceptors specially denied, is required before a recovery can be had..... *Fryer et al. vs. Darey.* 527

11. A bank employing a notary to protest a note deposited for collection, is not liable for the official misconduct, or failure of the notary to give notice to the endorsers, by which the latter is discharged.

*Hyde & Goodrich vs. Planters Bank of Mississippi.* 560

12. Where the notary states he demanded payment of F.F., the attorney in fact of the drawer, the notary's statement is no evidence of the agency. It should have been proved on the trial like any other fact..... *Fortier vs. Field.* 587

BONDS.

PAGE.

1. Where a bond is taken payable to A. B. sheriff, &c. he cannot sue in his individual capacity to recover the amount from the obligors, when there is no evidence that he acquired any right to it but the bond itself. . . . . *Buisson vs. Hyde et al.* 19
2. It is not certain that an ex-sheriff could recover on a bond taken payable to himself as sheriff, after he is *functus officio*. . . . . *ib.*
3. A sheriff's bond taken under an order of court, payable to him as sheriff, for the price of property sold, gives him no right to the bond in his former capacity of sheriff, when he has resigned, as the legal agent of the parties interested, and less so in his individual capacity. . . . . *Buisson vs. Hyde et al., on a re-hearing.* 22
4. Where a bond is taken to the sheriff in his official capacity, although it be not payable to his successors in office, yet on his resignation his successor ought to be the official depository of the bond. . . . . *ib.*
5. A sheriff having ceased to be a public officer, has no longer any right to keep, or collect any bonds given to him as sheriff, in execution of any order of court. . . . . *ib.*

(SEE BAIL AND BAIL BONDS.)

BOUNDARY.

1. An action of boundary lies not only where two contiguous estates have never been separated, but also where the old boundary is effaced and can no longer be seen. . . . . *Zeringue vs. Harang's Administrator.* 349
2. Where vestiges of the ancient boundary between two plantations are to be seen, new posts should be fixed, but they must be placed where the former limit or fence stood, without regard to the title papers. . . . . *ib.*

CITATION.

1. In this case there were two persons of the same name, but service of citation was made on the wrong one, and the suit discontinued as to him; the other could not be sued by a mere amendment to the petition and adding the word *Junior*, without any new service of citation. . . . . *Dixon vs. Kennard & Shields.* 468
2. A citation addressed to and served on the agent of the defendant, when the latter is absent from the State, is sufficient to authorize a valid judgment as to the principal. . . . . *Cazeau vs. Lesparre.* 498

CLERKS.

1. Clerks of courts have no authority out of the presence of the court, to swear witnesses and take down their testimony in a cause. They are only to administer oaths in open court; and out of it in cases of arrest, attachment, provisional seizure, or generally, in any conservatory measure required by one of the parties to a suit. . . . . *Sandeman vs. Deake & Willard.* 332

COLLISION AND LOSS.

1. Where the evidence shows that a collision happened, and a slave, mules and



cart were run over and destroyed, by the fault and folly of the slave in driving across the rail road of the defendants, when the engine was approaching and near, the owner cannot recover any thing for their loss.

*Lesseps vs. Pontchartrain Rail Road Company.* 331

### COMMUNITY.

1. Where the object of the suit is to obtain a settlement and liquidation of the community formerly existing between the deceased husband and surviving wife; and for a partition of the residue after the payment of the common debts, the Courts of Probate have exclusive jurisdiction:..... *Lawson et ux vs. Ripley.* 258

2. Courts of Probate have *not exclusive* jurisdiction in suits for the purpose of dividing property belonging to a legal partnership or community between the surviving spouse and the heirs of the deceased one; but the District Court has concurrent jurisdiction in such cases. .... *ib.*

3. The marriage contract between the deceased spouse and defendant is admissible in evidence, although not specially pleaded, in a suit for the settlement of the community affairs and partition thereof. .... *ib.*

4. When the title to property brought into marriage had vested in the party, although not paid for, it became his separate property, and remained such at the dissolution of the community. .... *ib.*

5. Slaves received during marriage, by one of the spouses, in exchange or in payment of money due him on his separate and individual right, do not become community property. .... *ib.*

6. Where a house and lot the separate property of the wife, is mortgaged by the husband and wife for improvements and ameliorations put on them, *these last* become part of the community of acquets and gains, and are liable for the husband's debts. .... *Dominguez vs. Lee et al.* 296

### COMPENSATION AND RECONVENTION.

1. Pleas in compensation or reconvention should be set forth with the same certainty as to amounts, dates, &c., as if the party opposing them were himself a plaintiff in a direct action. Compensation must be specially pleaded.

*White vs. Moreno.* 371

2. Reconventional demand for damages for the wrongful suing out of an injunction and false imprisonment, cannot be pleaded and set up in a possessory action; they are independant and distinct from it and foreign to the cause on which it is based. .... *Morgan vs. Driggs et al.* 176

### CONFLICT OF LAWS.

1. The evidence of a fact, happening in a different country from that of the *lex loci contractus*, must be tested by the rules of evidence in this State, where the remedy is sought. .... *L. & T. F. Shewell vs. Raguet.* 457

2. So the testimony of one witness, that a debt contracted in Pennsylvania, exceeding 500 dollars in amount, was *acknowledged* by the debtor in his presence, in Texas, is *insufficient*, without some corroborating circumstances, to make proof and establish the demand in a court of Louisiana. .... *ib.*

3. The general principle is, that contracts in regard to *personal* property must be regulated by the *lex loci* of the domicile of the owner. But as relates to the remedies of creditors, personal property has a *situs*, a locality, which subjects it to the law of the country where it is situated, when there is a conflict.

*Beirne & Burnside vs. Patton et al.* 589

4. So an assignment made by debtors residing in Tennessee for the benefit of their creditors, of certain cotton in New Orleans, which is void under our laws, will not have effect as against an attaching creditor here, who is no party to it. *ib.*

5. Where a contract is either expressly or tacitly to be performed in another place than that where it is made it is to be governed by the law of the place of performance. *ib.*

6. A particular legacy here, by the law of Scotland would be considered as a pure bequest of a sum of money and not of heritable property, which if made by a person in Scotland to a citizen of Louisiana, the courts of law in that country will give effect to the legacy. . . . *Duke of Richmond et al. vs. Milne's executors.* 312

### CONTINUANCE.

1. Where a party had full time to secure the attendance of his witnesses and a continuance refused coupled with the declaration of the judge *a quo*, that due diligence was not used to obtain his attendance, the judgment will not be disturbed.

*Capdeviel vs. Dodd et al.* 149

2. In applications for a continuance much reliance will be placed in the discretion of the judge *a quo*; and unless positive injustice has been done, his judgment will be affirmed. *ib.*

### CONTRACTS.

1. An obligation or contract without a cause, or with a false or unlawful one, can have no effect; and the law will give no action to enforce it.

*Gravier's Curator vs. Carraby's Executor.* 118

2. No action can be maintained on a contract the consideration of which is wicked in itself or prohibited by law. *ib.*

3. So an agreement or contract that property which had been conveyed to persons to secure them for advances and protect the transferor from the pursuits of creditors, should be sold out by the former as theirs, and the price accounted for to the latter, over and above their advances, in preference to judgment creditors, cannot be enforced in a court of justice. *ib.*

4. Where an exception is put in at the argument in the supreme court suggesting that the contracts between the parties to the suit are illegal, immoral and contrary to public policy, the court is bound to notice it, even without any plea; and in such cases no recovery can be had.

*Gravier's Curator vs. Carraby's Executor; on a re-hearing.* 132

5. So where it is shown by the evidence that the contracts and agreements sued on, are of a character reprobated by law, no action can arise or recovery be had. *ib.*

6. Contract for *Morus Multicaulis* trees partly executed is rescinded and money paid, returned on account of imposition in delivering spurious trees.

*Anderson vs. Dinn* 186

7. The acts of a party from which the ratification of a contract is sought to be deduced, must evince clearly and unequivocally his *intention to ratify*. If his acts be in any manner accounted for without a ratification of the contract necessarily resulting from them, they do not amount to an approval or confirmation.

*Copeland vs. McMickie et al.* 296

8. A contract under a penalty to buy plaintiff's plantation for a certain price, payable in a year, but to be discharged on the vendor's obtaining a loan from bank on mortgage of the premises, by the vendee's taking his place: *Held* that as soon as the loan was obtained, the purchaser became liable for the penalty on failing to take his vendor's place as debtor to the bank. . . . . *Nettles vs. Scott.* 336

9. A notary may be employed as agent of the party to give notice in writing as the second mode under the La. Code, of putting the adverse to the contract in default. . . . . *ib.*

10. The interest stipulated on the price of a plantation, will be considered as a yearly sum for its use and occupation, when the vendee or party is in possession, independent of any damages or penalty the party may be liable for; or non-compliance with the contract of sale. . . . . *ib.*

11. The defendant who contracted under a penalty to buy the plaintiff's plantation for a certain sum, payable in a year, to be discharged on the vendor's obtaining a loan from bank on mortgage of the premises, by the vendee's taking his place: *Held*, that as soon as the loan was obtained the purchaser became liable in his contract, &c. . . . . *ib.*

12. The article 2257 of the La. Code requiring contracts for sums exceeding 500 dollars, to be proved by more than one witness, relates to *verbal* and not *written* obligations or contracts. . . . . *Police Jury of Iberville vs. Sherburne et al.* 342

13. When the thing sold remains in the corporeal possession of the seller who is suffered to act as owner, to the injury of a third person, the rule that the delivery of an immoveable always accompanies the public act which transfers the property, ceases to be applicable. . . . . *Thibodeaux vs. Thomason et al.* 353

14. The creditor who has contracted under the faith of his debtor's being the owner of property which he is in possession of at the time of the contract, ought to be allowed to seek his remedy without regard to the date of the pretended sale by which it is attempted to be transferred to another. . . . . *ib.*

## CORPORATIONS.

1. In a suit for a liquidation among stockholders of an incorporated company, it cannot be legally tried, nor judgment rendered, unless all the parties have been cited, answered, or judgments by default taken against them.

*Reynolds, Byrne & Co. vs. Feliciana Steam-boat Company.* 397

2. Stockholders in an incorporated company cannot be rendered liable *in solido*. The corporators are only liable in proportion to the stock each one holds. . . . . *ib.*

3. The fact that the stockholders are made liable for losses, beyond the amount of the capital stock, does not make each stockholder liable *in solido*, but only proportionally according to the number of shares held by him. . . . . *ib.*

4. The town of Fochabers in Scotland, is a burgh of Barony under the Ducal family of the Duke of Richmond, incorporated as such; has a right to enjoy

the privileges allowed them as a corporation; and as such, has capacity to receive by donation *inter vivos* or *mortis causa*, which right it can exercise by trustees. . . . . *Duke of Richmond vs. Milne's Executors et al.* 312

COSTS.

1. According to the Civil Code of 1808, costs of suits against an insolvent debtor previous to his failure, and *taxed costs* of every kind were entitled to be paid by privilege under the denomination of law charges.

*Rousseau vs. His Creditors.* 206

2. Under the Louisiana Code, *law charges* are defined to be costs incurred in court in the prosecution of a suit, to be paid by the party cast; and the creditor is entitled to a privilege when the costs he claims are *taxed costs*; whether in a suit previously to or in the *concurso*, against the insolvent debtor's estate. . . . . *ib.*

3. Where the plaintiffs take nothing by their suit, the defendants should be allowed all their costs. . . . *Orleans Navigation Company vs. Municipality No. 2.* 260

4. The jury tax in some of the parishes, required to be paid by the party cast, or who discontinues his suit, does not make part of the legal costs, to be taxed in the suit and paid before another suit can be commenced.

*Whittemore & Young vs. Leake & Howell.* 453

5. The payment of the ordinary taxed costs of the clerk's and sheriff's fees is a sufficient compliance with the article 492 of the Code of Practice, to authorize a party non-suited, or who discontinues to begin. . . . . *ib.*

COURTS.

1. The court of probates, in ordering the sale of the property of a succession, necessarily possesses the power to *erase all mortgages* existing on it, and to give a clear title to the purchaser. . . . . *Williams vs. Bank of Louisiana.* 378

2. Probate courts are authorized to exercise all such powers as may be necessary to enforce their jurisdiction; and to take cognizance of any matter arising from the consequence of the exercise of such jurisdiction. . . . . *ib.*

3. The evidence of the parish Judge is good in the court of probates as far as it goes to show the defendants assented to the sale, and agreed to look to the proceeds of certain property for their claims. . . . . *ib.*

4. The city court of New Orleans is without jurisdiction in a proceeding where interrogatories are propounded to garnishees, under the 13th section of the act of 1839, amending the Code of Practice, having for its object to set aside a sale of immoveable property, as simulated and made in fraud of creditors. This court cannot take cognizance of civil cases of a real nature.

*Samory vs. Hebrard et al.* 555

5. The city court has express authority and power to try suits on notes or obligations given for immoveable property and slaves; and when a rescission of the sale is claimed in the defence. . . . . *ib.*



## CREDITORS.

1. The seizing creditor is entitled to the revenues of the property whilst under seizure, from the time it was made until the property is sold.

*Randall vs. Bank of Louisiana.* 273

## DAMAGES.

1. Damages for a frivolous appeal will not be allowed when the matter in dispute is not for a sum of money, as the rescission of a sale of a house and lot, and its value is not shown. . . . . *Lopez et al. vs. Borgel, f. w. c.* 257

2. Where the injury complained of is injury done to the plaintiffs works, and the matters in contest are the actual damages or injury done and sustained, the court will not enquire into the plaintiffs titles or chartered rights to make the public works in question.

*Orleans Navigation Company vs. Municipality No. 2.* 269

3. Damages for the wrongful suing out of an injunction, may be claimed in the same suit under the act of 1831, in cases embraced by it; but from its wording, it appears to apply particularly where judgements are enjoined.

*Morgan vs. Driggs et al.* 176

4. Redress in damages should in all cases be proportioned to the injury sustained, unless where given as an example to deter others from similar conduct in future. . . . . *Stinson, Curator, &c. vs. Buisson.* 567

## DONATION.

1. A note executed in *extremis* in favor of the concubine for a sum of money shown to have been in lieu of the value of a house and lot which the deceased intended to bequeath, but was unable to make his will; is considered as a disposition *mortis causâ*, and not being clothed with the formalities of law is without effect. . . . . *Barriere, f. w. c., vs. Gladding's Curator.* 144

2. No disposition *mortis causâ* can be made but by last will and testament; and when it is clearly proved that the deceased intended to make his will for the avowed purpose of bequeathing to his concubine certain immoveable property, but was prevented and gave a note for its value, no recovery can be had on it. . . . . *ib.*

3. A donation of slaves without estimation under the old Civil Code is null, although accompanied by delivery, as delivery only applied to *moveables*; but under the Louisiana Code a donation of a house and lot is valid *without estimation* or appraisalment, which only is required in cases of moveable effects.

*Macarty vs. Commercial Insurance Company.* 365

4. Testimonial proof will not be received to show that in case of a donation of a house and lot by authentic act, it was agreed the donor should continue to receive and enjoy during his life time, the *rents* of the property. . . . . *ib.*

5. The article 904 and two following of the La. Code, in both languages, when construed together and interpreted according to the spirit or intention of the Legislature, provide only that ascendants or donors are entitled to inherit to the exclusion of all others, the real property and slaves given by them to their children, or their descendants, *who die without posterity*, when these objects are found in their succession. . . . . *Rouanet vs. Hunt, Tutor, &c.* 407

6. The right to inherit, or right of return or reversion allowed by law to the donor, does not accrue unless the donee *dies without posterity*, and depends upon this contingency. .... *ib.*

7. So the interpretation of the 904th article of the Louisiana Code given in the case of *Prejean's heirs vs. Le Blanc*, [3 La. Rep., 19] is *overruled* and ceases to be considered a proper and correct interpretation, .... *ib.*

### EVICITION OR DISTURBANCE.

1. The purchaser who has paid before the *disturbance* of his possession, cannot demand restitution of the price, or security under article 2538 of the Code; and the same rule applies to *such portion* as happens to be paid at the time of the disturbance. .... *Wallace & Co. vs. Harty & Jones.* 25

2. So where suit is brought on one of several notes given for the same object, the defendants can only require security for the amount of the note sued on, in case of disturbance of possession or title. .... *ib.*

3. Security against the danger of eviction will be required when the title is not complete, although the lapse of time renders the probability of a disturbance somewhat remote.

*Hardy, Superior of Convent of Sacré Cœur vs. Landry's Heirs.* 191

4. When security is given against a disturbance or eviction, the vendor may proceed with his executory process for the *price* due on the sale. .... *ib.*

### EVIDENCE.

1. The certificate of the French officers under the colonial government of Louisiana, that the plaintiff's ancestor was in possession of a certain tract of land, under a purchase from the Indians, &c., is not legal evidence of title, and is inadmissible as evidence in a petitory action. .... *Rillieux's heirs vs. Singletary.* 88

2. The officers of the French government could only certify such records or documents as were deposited in their departments; and such documents should be produced. If they certify of their personal knowledge, they should be sworn. .... *ib.*

3. The acknowledgment of masters of steamboats of the correctness of bills presented for supplies or other things furnished the boat, are binding on the owners. .... *Black vs. Savory et al.* 85

4. To let in evidence of payment, such payment must be specially pleaded.  
*Landry vs. Baugnon.* 82

5. Where part of a letter is offered in evidence and objected to, if any part of it is used the party must admit the whole of it in evidence. .... *Clifton vs. Lapice.* 152

6. The marriage contract between the deceased spouse and the defendant, is admissible in evidence, although not specially set up in the pleadings, in a suit for the settlement of the community affairs and partition thereof.

*Lawson et ux. vs. Ripley.* 238

7. Parties are not to be controlled in the order or manner of introducing the different parts of the evidence of their case. *Perkins vs. Nettles' administrator.* 253

8. So the plaintiff may first be allowed to produce the *proces verbal* of the sale



- under which he claims, in evidence, before showing that he has complied with the terms of said sale. .... *ib.*
9. Objections that a private act of transfer of a judgment, to the plaintiff's attorney in fact has no date against third persons, and that there is a discrepancy in the name of the transferee, go to the effect and not to its admissibility in evidence; especially when the variance is explained. .... *Randall vs. Bank of Louisiana.* 273
10. A recital in a deed or act of mortgage cannot produce any effect to the prejudice of a person not a party to it and who does not claim under; and such recital is not against a stranger to the second deed. .... *ib.*
11. Parol evidence is admissible to prove agency, and that the agent was employed to make demand on the adverse party, and that it was made in writing. .... *Laville vs. Rightor et al.* 303
12. The signatures to a sheriff's bond executed and acknowledged before the parish judge need not be proved to admit it in evidence. .... *Police Jury of Plaquemine vs. Sherburne et al.* 342
13. In a suit on the sheriff's bond to recover from him and his securities, the balance of the parish taxes due, it is not required to put the parties in default; not even to recover the penalty. .... *ib.*
14. The 1042d article of the Code of Practice directs the testimony of witnesses in causes tried before the Court of Probates to be taken down in writing by the judge and annexed to the record; also a list of the documents filed by the parties, that they may be read on the appeal; and when this is not done, the case will be remanded at the cost of the appellee. .... *Desorme's heirs vs. Desorme's syndic.* 111
15. In an action for damages to plaintiffs' works and land, parol evidence is admissible to prove possession and acts of ownership of the premises. .... *Barrataria and Lafourche Canal Co. vs. Field et al.* 421
16. Evidence is admissible which is pertinent to the issue, going to show the extent of the injury complained of, and the cause from which it proceeds. .... *ib.*
17. A witness will not be allowed to be interrogated respecting the ownership of a tract of land, when an examination of the written title would show it. .... *ib.*
18. The declarations of defendant's husband, separated in property but acting as her agent, made in relation to the management of her levees is admissible in evidence against her, in an action for damages, in neglecting to keep them up. .... *ib.*
19. The record of a suit in admiralty will be received in evidence to show the fact of insolvency of an individual, in a suit in which he is no party, when it is only required to prove *res ipsas*; and to show how certain funds were distributed. .... *Gillett vs. Landis et al.* 470
20. Evidence will not be admitted on a simple allegation that the plaintiff is not the owner of the instrument sued on. The defendant must aver that he has a good defence against the real owner; otherwise whether the plaintiff is owner or not, cannot avail him. .... *Peyroux et al. vs. Davis.* 479
21. Parol evidence of the law of a State is admissible when it appears the common law only prevails. It is only when the evidence discloses a statute sought to be proved, that a certified copy is the best evidence and must be produced. .... *Wetmore & Co. vs. Merrifield.* 513

22. Proof of the signatures of the subscribing witnesses to an act *sous seing privé* by the testimony of a witness will suffice without their production.

*Buel vs. New York Steamer et al.* 541

23. An act of sale under private signature not recorded, is sufficient to prove ownership of a slave, when there is no adverse claim, and to show the defendant's liability for his loss. . . . . *ib.*

24. Evidence of a fact, happening in a different country from that of the *lex loci contractus*, must be tested by the rules of evidence in the State where the remedy is sought. . . . . *L. & T. F. Shevell vs. Raguet.* 457

25. Parol evidence is admissible to show by the practice and laws of another state, it is not necessary to present a note for payment, at the place designated therein, in order to maintain an action against the maker.

*Booraem vs. Littlefield.* 594

26. It is only the written or statute laws of a state that cannot be proved by parol; a certified copy is the best evidence. . . . . *ib.*

### EXCEPTIONS.

1. Where an exception is put in at the argument in the Supreme Court, suggesting that the contracts between the parties to the suit, are illegal, immoral and contrary to public policy, the court is bound to notice it even without any plea; and in such cases no recovery can be had.

*Gravier's Curator vs. Carraby's Executor.* 132

2. An exception which goes to the absolute want of any right in the plaintiff to stand in judgment in any manner may be pleaded after issue joined on the merits, or at any stage of the case. . . . . *Union Bank vs. Dunn et al.* 234

3. The peremptory exception given by the 1988th article of the Louisiana Code, which says "no creditor can sue individually to annul contracts made before his debt accrued, applies to all contracts in fraud of creditors, when it appears the debtor never ceased to have possession of the property apparently sold by him.

*Thibodeaux vs. Thomasson et al.* 353

4. The Judge is not required to sign a bill of exceptions which does not embrace the true grounds of his opinion. A party taking a bill of exceptions must spread on its face every thing necessary to bring the point in its true light before the court. . . . . *Barrataria and Lafourche Canal Co. vs. Field et al.* 421

5. The exception of *lis pendens* may be waived, and will be so considered, when the party fails to use it. . . . . *Cazeau vs. Lesparre.* 498

### EXECUTRIX.

1. An executrix cannot be arrested on the opposition and affidavit of a creditor of the estate she administers, on the ground that she will leave the State before her account is homologated, and without leaving sufficient funds to pay his debt.

*Mondelli vs. Russell's Executrix.* 537

### GARNISHEES.

1. Service of a supplemental petition with citation is insufficient to bring the

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- garnishees before the court when there has been no service of the original petition on them..... *Lovell et al. vs. Cartwright.* 547
2. Until garnishees are served with a copy of both the original and supplemental petitions they are not required to answer interrogatories and consequently these cannot be taken as confessed..... *ib.*
3. Second garnishees are entitled to have the amount attached in the hands of the first ones deducted from the amount claimed; and are only liable for the remainder..... *ib.*

### HUSBAND AND WIFE

1. Property bought with the funds of the wife, or acquired by her in consequence of a *datien en payement* made to her by her tutor, and which never came under her husband's administration, is her separate or paraphernal property.  
*Dominguez vs. Lee et al.* 295.
2. The wife has the power to administer alone her paraphernal estate as she pleases; and has a right to alienate her separate property and to invest her paraphernal funds in whatever manner she thinks proper and most advantageous to her interest, if done with the authorisation of her husband..... *ib.*
3. Property purchased with the paraphernal funds of the wife is only her separate property as long as she keeps the administration of her separate estate, and when the title is taken in her own name, either as purchased with the funds she administers without the assistance of her husband, or as a *datien en payement* made to her by the debtor of a separate and paraphernal claim..... *ib.*
4. Where a house and lot, the separate property of the wife, is mortgaged by husband and wife for improvements and ameliorations put on them, *these last* become a part of the community of acquets and gains and are liable for the husband's debts..... *ib.*

### IMPRISONMENT FOR DEBT.

1. When the law abolishing imprisonment for debt, and with it the *capias ad satisfaciendum* was promulgated, every proceeding began, but not perfected under these writs, became null and void..... *Cooper vs. Hodge et al.* 476
2. So when this act took effect a *capias* in the hands of the sheriff became a nullity, and the bail was thereby instantly discharged..... *ib.*
3. Writs of *capias ad satisfaciendum* in the hands of the sheriff when the act abolishing imprisonment for debt was promulgated, became absolute nullities; an attempt to execute them would make the sheriff a trespasser, and a return of *non est inventus* would not enable the party to proceed against the bail.  
*Atchafulaya Bank vs. Hozey, sheriff.* 509
4. The act of the 28th March, 1840, abolishing imprisonment for debt, section 5, authorising two creditors, having two or more judgements each exceeding 300 dollars to unite in a petition requiring the common debtor, who they swear has assets, to make a surrender; also requires that both creditors shall take the oath. It is not sufficient that one of them, having two judgements alone, shall make the affidavit..... *Segher's et al. vs. Courcelle.* 551

5. After the promulgation of the act abolishing imprisonment for debt, no *ca sa* could issue; and all process against the body of the debtor being gone, the liability of the bail ceased; as he had no longer the power of keeping or surrendering the principal debtor. . . . . *Dorgsted & Co. vs. Nolan et al.* 593

### INJUNCTION.

1. Attorney's fees are sometimes allowed as special damages on the dissolution of an injunction wrongfully sued out, as a punishment for the unjustifiable resort to this as a means of delay to defeat the ends of justice. . . . . *Smith vs. Bradford.* 263

2. But where an injunction is maintained against hypothecary or executory proceedings on account of any defect in the affidavit and other of the proceedings, special damages or lawyer's fees will not be allowed. . . . . *ib.*

3. Damages for the wrongful suing out of an injunction may be claimed in the same suit under the provisions of the act of 1831, in cases embraced by it; but from its wording it seems to apply particularly where judgments are enjoined. . . . . *Morgan vs. Driggs et al.* 176

4. Where there are irregularities in the proceedings of plaintiff in issuing a *pluries* writ of seizure; and also in the defendant's enjoining it for the whole, when it was admitted part of the sum claimed was due, the injunction will be dissolved at defendant's costs. . . . . *Salter vs. McHenry et al.* 507

5. An affidavit stating all the material allegations in the foregoing petition are just and true and are such in the opinion of the affiant, to authorize the issuing of an injunction, is sufficient to support the injunction. . . . . *Boatner vs. Walker et al.* 461

6. The materiality of facts and their sufficiency to sustain an injunction, are matters of law, which must be decided by the court. . . . . *ib.*

### INSURANCE.

1. The bare possibility that a right to property might hereafter arise cannot be considered as an insurable interest. . . . . *Macarty vs. Commercial Insurance Company.* 365

2. To have an insurable interest in any subject or property, a person must be liable to a direct and immediate loss by its damage or destruction. . . . . *ib.*

3. So where a party has parted with all his insurable interest in property, before its destruction, he cannot recover. . . . . *ib.*

4. A policy of insurance against fire is a personal contract of indemnity with the insured; and if the latter parts with all his interest in the property before the loss happens, the policy becomes void, unless it has been assigned to the new proprietor with the assent of the underwriters. . . . . *ib.*

### INSOLVENCY.

1. The peremptory exception given by the 1988th article of the Code which says, no creditor can sue individually to annul contracts, made before his debt accrued, will apply to all contracts made in fraud of creditors, when it appears the debtor never ceased to have possession of the objects apparently sold by him. . . . . *Thibodeaux vs. Thomasson et al.* 353



2. The creditor who has contracted under the faith of his debtor's being the owner of property which he is in possession of at the time of the contract, ought to be allowed to seek his remedy without regard to the date of the pretended sale or contract. . . . . *ib.*
3. A mortgagee claiming to have a mortgage on some of the property surrendered, given by the wife of the insolvent, cannot be admitted to a meeting of his creditors and vote for a sale of the property for cash. . . . . *ib.*
- Bostwick vs. His Creditors.* 505
4. None but a creditor of the insolvent can be present at the meeting of his creditors. A mortgagee of some of the property surrendered, who is not a creditor, can exercise his hypothecary action against it, or its proceeds in the hands of the syndic. . . . . *ib.*
5. The syndic is without authority to raise mortgages existing on property surrendered, in favor of persons, before it passed into the hands of the insolvent, and who are not his creditors. . . . . *Foley vs. Dufour et al.* 521

### INTEREST.

1. When legal interest is the consequence of the debt or obligation without stipulation, a demand of the principal is a demand both of principal and interest; the one necessarily follows the other, even when the latter is not claimed in the petition. . . . . *Duke of Richmond et al. vs. Milne's Executor et al.: on re-hearing.* 328
2. So interest on a particular legacy is due from the day of demand of its delivery, arising *ex mora*, depending on the lapse of time the legatee is deprived of the use of it; being a legal consequence of the debt or obligation and may be allowed without being specially claimed in the petition. . . . . *ib.*

### JUDGMENT.

1. Judgment of the inferior court confirmed with consent; damages being waived. . . . . *Weems vs. Boyle et al.* 237
2. Judgment not rendered between the parties cannot form the plea of *res judicata*. . . . . *Randall vs. Bank of Louisiana.* 273
3. No final judgment can be rendered without an answer filed or judgment by default; not even a non-suit; and this being the case, however reluctantly, the court will remand the case for the proper issues to be made up. . . . . *Laville vs. Rightor et al.* 303
4. Where the defendants are not all joint obligors and liable in the same manner, different judgments may be rendered and be final as to some, and the case remanded so far as it respects others. . . . . *ib.*
5. A judgment under which a sheriff's sale was made must be produced as the basis on which execution issued, and which is of itself *prima facie* evidence of the regularity of the previous proceedings. . . . . *Childress vs. Allin et ux.* 37
6. The general rule is that the purchasers under the faith of proceedings apparently sanctioned by a judgment of the Probate Court, cannot be affected by a suit of the minor seeking to annul those proceedings. . . . . *Lescaudier vs. Dashiell.* 194
7. A judgment not attacked as fraudulent or collusive is *prima facie* evidence

that the sum, for which it was rendered, is justly due the minor in whose favor it was given. . . . . *ib.*

8. A party having obtained judgment on a note in another state, cannot sue on the note, or on an account made up from the judgment and costs. He must sue on the record of the judgment, not on a parol acknowledgment of its correctness. . . . . *Daugherty et al. vs. Crumbaugh.* 452

9. The law expressly requires that all final judgments shall be signed before execution can issue. It is not enough for the judge merely to sign the minutes of the proceedings of the court. . . . . *State vs. McDonald et al.* 485

10. Where the evidence sustained the judgment and no amendment asked by the appellee it was affirmed with costs. . . . . *Stamps vs. Marigny's attorney in fact.* 586

### JURISDICTION.

1. Where the principal demand is evidently fictitious designed to give jurisdiction to the court, the appeal will be dismissed. . . . . *Orillion vs. Slack.* 102

2. This court will not encourage attempts to evade the provisions of the constitution, limiting its jurisdiction. . . . . *ib.*

3. Where the object of the suit is to obtain settlement and liquidation of the community formerly existing between the deceased husband and surviving wife, and for a partition of the residue, after payment of the common debts, the Court of Probate has exclusive jurisdiction. . . . . *Lauson et ux. vs. Ripley.* 238

4. This court has exclusive jurisdiction of all matters concerning estates, particularly those in a course of administration. . . . . *ib.*

5. Whenever a question to real property and slaves arises collaterally in the Court of Probates, and an examination of it becomes necessary, in order to give the court the means of arriving at a correct conclusion on matters of which it has jurisdiction, it must take cognizance of such title. . . . . *ib.*

6. Courts of Probate have *not exclusive* jurisdiction in suits for the purpose of dividing property belonging to a legal partnership or community between the surviving spouse and the heirs of the deceased one; but the District Court has concurrent jurisdiction in such cases. . . . . *ib.*

7. Judgment of the inferior court affirmed by consent; damages being waived. . . . . *Weems vs. Boyle et al.* 237

8. It may be shown by affidavit in this court that the matter in dispute exceeds 300 dollars and gives jurisdiction. . . . . *Perkins vs. Nettle's administrator.* 253

9. Courts of general jurisdiction cannot sustain an action to establish a Will, and decree its execution; and also the recovery under it. . . . . *Robert f. w. c. vs. Altier's agent.* 104

10. Whenever the validity of a Will is attacked and put at issue at the time that its execution is applied for; or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into the possession of the estate under it, *Courts of Probate alone have jurisdiction.* . . . . . *ib.*

11. In an action by an heir at law against the testamentary heir or universal legatee, who is in possession, and sets up the Will as his title to the property, the district courts, or courts of general jurisdiction are the proper tribunals in which such suits must be brought. . . . . *ib.*



12. It is no bar to a suit in one of the state courts of Louisiana, or cause to deprive it of its jurisdiction, that a suit may have been commenced in another state or country between the same parties for the same cause of action. It would be otherwise if brought before two tribunals of concurrent jurisdiction within the state.

*Peyroux et al vs. Davis.* 479

## JURY.

1. Whatever respect may be entertained for the verdict of a jury the court will disregard it, when the evidence is conclusive in opposition to it.

*Melançon vs. Robichaux.* 97

2. The verdict of the jury should always respond to the issues made by the pleadings and pass on the principal actions; and, unless special, it ought in cases of reconvention to pronounce upon the respective rights or actions of both parties.

*Morgan vs. Driggs et al.* 176

3. The party dissatisfied with the verdict of the jury is expressly allowed three days in which to move for a new trial; but he may waive this right by omitting to ask for a new trial: And having done so, he cannot ask that the judgment be amended or claim relief from the verdict in this court; especially when he opposed the adverse party's attempt to obtain a new trial. . . . . *Nettles vs. Scott.* 336

## LANDS AND LAND-LAWS.

1. Delivery of the original is not of the essence of a grant, patent or commission, although the delivery of the thing granted is essential to the validity of the grant. . . . . *Lavergne's heirs vs. Elkin's heirs* 220

2. If it appears the original grant was never delivered, a copy of the record of it may be given in evidence. . . . . *ib.*

3. A grant which was complete under the French or Spanish Governments of Louisiana, required no confirmation to give it validity under ours. . . . . *ib.*

4. So a spanish grant made to the ancestor of the plaintiffs in 1771, of land, found only in the book of grants, deposited in the land office, is held to be sufficient evidence of title. . . . . *ib.*

5. Possession by the government of the United States of a tract of land, cannot avail the party on his plea of prescription, when there is evidence that the title was in the plaintiffs before the treaty of cession. . . . . *ib.*

## LAWS.

1. All statutes or laws, in *pari materia*, ought to be construed together in order to arrive at and ascertain the true meaning of the legislator.

*Rouanet vs. Hunt, tutor, etc.* 407

2. Courts are bound to take notice of the date of laws, although there is no evidence adduced of their promulgation. . . . . *Stinson, Curator, etc. vs. Buiesson.* 567

## LEGACIES AND LEGATEES.

1. It is necessary to enable a legatee to take, under our laws, that he be in existence at the time of opening the estate and have capacity to receive, if the legacy

be absolute; but if it is conditional, it is sufficient if the capacity to receive, exist at the time of the fulfilment of the condition.

*Milne's heirs vs. Milne's executors.* 46

2. Where legacies were given by the late Julian Poydras to the parishes of Pointe Coupée and West Baton Rouge for particular specified objects, the legacies were absolute; but there was no capacity in the legatees to take at the moment of opening the succession; and laws were passed authorizing the Police Juries of those parishes to accept the legacies for the objects named. . . . . *ib.*

3. So where legacies were left to two asylums for destitute orphan boys and destitute orphan girls, with directions to the executors to cause the same to be duly incorporated: *Held*, that these dispositions were conditional, and as soon as the condition was fulfilled by incorporating those Asylums, the capacity to take the legacies was then created. . . . . *ib.*

4. The direction of the testator to hand over the legacies when the asylums are incorporated, is not in violation of the provisions of the Code which declares that substitutions are abolished. . . . . *ib.*

5. The object in abolishing substitutions, &c., was to prevent property from being tied up in the hands of individuals, and placed out of commerce; but it was never contemplated to abolish naked trusts which were to be executed immediately. . . . . *ib.*

6. A particular legacy is to be discharged in preference to all others out of the funds of the succession; and in default of funds it is to be paid, as long as the estate is administered by executors, indifferently out of the personal and real estate, and becomes a charge on the whole estate; and descends to the heir as a personal debt when he takes possession. Interest is due thereon.

*Duke of Richmond et al. vs. Milne's executors.* 312

7. A particular legacy here, by the law of Scotland would be considered as a pure bequest of a sum of money and not of heritable property, which if made by a person in Scotland to a citizen of Louisiana, the courts of law in that country will give effect to the legacy. . . . . *ib.*

8. So where, as in this case, a particular legacy of \$100,000 is bequeathed by a citizen of Louisiana, to establish a free school in his native town of Fochabers, in Scotland, it being purely moveable in its nature, and independant in any manner of heritable property, must consequently be paid out of the estate, without reference to any particular real estate. . . . . *ib.*

9. Interest on a particular legacy is due from the day of demand of its delivery, arising *ex morâ*, and depending on the lapse of time the legatee is deprived of the use of it; being a legal consequence of the debt or obligation; and may be allowed without being specially claimed in the petition.

*Same vs. same; on a re-hearing in part.* 328

10. Interest is due on a legacy for a specific sum of money from judicial demand and follows as a legal consequence of the debt or principal obligation. . . . . *ib.*

## LEVEES.

1. It is not necessary to show police regulation to compel a front proprietor to

make his levee on a bayou communicating with the river. Under the law of 1829 all riparian owners are bound to keep up levees on their fronts; and in neglecting to do so, are liable for all damages and losses, agreeable to articles 2234-5 of the Louisiana Code. . . . . *Barrataria and Lafourche Canal Co. vs Field et al.* 421

### MARITAL PORTION.

1. The action given to the surviving wife, to claim her marital portion when she is in necessitous circumstances, presupposes a liquidation and final settlement of the succession of the husband; and also of the community lately existing between them. . . . . *Harrell vs. Harrell et al.* 374
2. It is only after the liquidation and settlement of the succession that the action for the marital portion, is open, which depends on two essential and relative facts; that the husband *died rich* and left his widow in necessitous circumstances. *ib.*

### MINORS.

1. Where the minor's rights against his tutor are secured by a special mortgage regularly accepted by a family meeting and by the court, the purchaser is justified in concluding that the general mortgage in favor of the minor has ceased to exist. . . . . *Lesanier vs. Dashiell.* 194
2. Third persons dealing with a tutor are bound to inquire how the minor's rights are secured; and the general mortgage resulting from the tutorship only ceases to exist with regard to third persons after the special mortgage has been accepted and recorded. . . . . *ib.*
3. The general rule is that purchasers under the faith of proceedings apparently sanctioned by the probate court, or a judgment cannot be affected by a suit of the minor seeking to annul those proceedings. . . . . *ib.*
4. Where the proceedings in the court of probates do not conform to all the provisions and formalities of the law required in giving special, in lieu of a general mortgage, the judgment rendered therein is not sufficient to protect purchasers against the minor's general mortgage. . . . . *ib.*
5. And where no experts were appointed no previous liquidation of the minor's rights had and the act of special mortgage not accepted by the judge or under tutor, and never sanctioned by the court of probates, such proceedings will not authorize the purchaser from the tutor, to disregard the minor's general mortgage. . . . . *ib.*

### MORTGAGE AND PRIVILEGE.

1. The renewal of the registry of a mortgage after the lapse of ten years from the recording, cannot avail the mortgagee against an ordinary third possessor, or subsequent mortgagee. . . . . *Dupuy vs. Dashiell.* 60
2. But where a subsequent purchaser assumes the payment of the mortgage debts due the original vendor, he cannot avail himself of the want of re-inscription of the original mortgage within the ten years. . . . . *ib.*
3. Where the subsequent purchaser assumes the mortgage debts of his vendor to the original seller with a clause that "the plantation and slaves remain spe-

	PAGE
cially mortgaged to secure their payment," it has the effect of giving a new right of mortgage to the original vendor.....	ib.
4. The subsequent purchaser and third possessor who assumes the debts of his vendor, can also avail himself and plead any payments the vendor may have made and which have not been allowed.....	ib.
5. The taking a mortgage on a vessel by notarial act to secure loans or notes due by the owner on account of the vessel, does not confer any right or privilege whatever; ships not being susceptible of mortgage.....	<i>Grant vs. Fiol et al.</i> 158
6. So a creditor for advances or loans in money made to the owner and applied to the use of the vessel, has no privilege allowed him by law.....	ib.
7. Attaching or seizing creditors are entitled to a preference over ordinary creditors; and over each other, according to the order of their seizures.....	ib.
8. Claims for towage are not entitled to a privilege, it not being expressly allowed by law.....	ib.
9. Where property is mortgaged to the Bank of Louisiana and is sold by the administrator of the estate, by order of the court of probates, the bank, by the provisions of its charter, is not bound by the probate proceedings, alone, and the purchasers do not take the property free of incumbrance, but subject to the bank's mortgage.....	<i>Williams vs. Bank of Louisiana.</i> 378
10. Judicial mortgages resulting from recorded judgments of creditors of a tutor, acquired under the faith and protection of a court of competent jurisdiction, which had never been annulled or attacked, will be satisfied in preference to the minor's general mortgage, purporting to have been raised by this judgment.	
	<i>Lesassier vs. Dashiell.</i> 194
11. But where the proceedings in the court of probates do not conform to all the provisions and formalities of the law required in giving special, in lieu of a general mortgage, the judgment rendered therein is not sufficient to protect purchasers against the minor's general mortgage.....	ib.
12. The syndie is without authority to raise mortgages existing on property surrendered, in favor of persons, before it passed into the hands of the insolvent and who are not his creditors.....	<i>Foley vs. Dufour et al.</i> 521
13. The first and oldest mortgagee, who purchases in the premises is subrogated to all the rights under this mortgage, sufficient to repel a younger mortgagee seeking to disturb him.....	<i>Seghers et al. vs. Courcelle.</i> 551
14. There is no privilege allowed by law in favor of daily or monthly laborers employed in a saw-mill.....	<i>Barbour et al. vs. Duncan's Curator.</i> 439
15. Lessors have the highest order of privileges expressly given, by taking or seizing the moveable effects of the lessee found on the property leased.....	ib.

## NEW ORLEANS.

1. The City limits of New Orleans terminates at the outer edge of the levee, towards the river Mississippi, which is by law the bank of the river, and the line of division between the municipalities consequently terminates there.  
*Municipality No. 2 vs. Municipality No. 1.* 573
2. The direction of the wharves, necessary to be built after the division of the



- city into municipalities, is governed by different rules from the lines of division on shore. Each municipality should construct the wharves within its limits at right angles to the levee, by running square into the river. .... *ib.*
3. So where the Municipality No. 1 extended its wharf at the divisional line *diagonally into the river*, in the direction of the course of the dividing line on shore, it was ordered to be demolished, and the wharf to be made at right angles with the bank of the river. .... *ib.*

### NEW TRIAL.

1. In an affidavit for a new trial on the ground of newly discovered evidence since the trial, the party must not only show that he used every effort in his power to procure the evidence, but also that it is admissible and material under the pleadings. .... *Landry vs. Baugnon.* 82
2. So in a motion for a new trial after judgment by default is made final, newly discovered evidence of payment is insufficient, as it would not be admissible without new pleadings or answer filed; and no amendment of the pleadings will be permitted after judgment. .... *ib.*
3. When new evidence on which a new trial is based, is discovered while one of the party's witnesses is under examination, he should immediately move for a continuance, allowing time to procure the newly discovered evidence.

*Davis vs. Davis's Syndic.* 259

4. A party dissatisfied with the verdict of a jury, is expressly allowed three days in which to move for a new trial; but he may waive this right; and he will be considered as having done so, when he neglects to avail himself of it. Having waived this right, he cannot claim relief in this court; especially when he opposed the adverse party's attempt to obtain a new trial. .... *Nettles vs. Scott.* 336
5. It is different in relation to new trials asked from the court. The party may well imagine he cannot change the decision, when he has no new argument to offer to the same judge who rendered the first judgment; but a new jury sits in the second or new trial. .... *ib.*

### NOTARIES.

1. The notary must state facts and show what he has done to find out the residence of an endorser, and give notice of protest; and not merely to assert in general terms that he made diligent inquiry and was unable to ascertain it.

*Fleming et al. vs. Hill.* 1

2. So when the notary's clerk testified that "he had made diligent inquiry and endeavored to find out the residence of the endorser," but in vain; it was held to be insufficient. The particular facts must be shown to enable the court to determine if proper diligence has been used. .... *ib.*

3. The presumption resulting from the official character and certificate of the notary is, that due demand was made of the drawer or maker of a note; and the onus is upon the adverse party to show that no such demand was made. It is not enough to show that they failed to recover of their immediate endorser for want of due demand and notice, in a case where the notary was not a party.

*Oakey et al. vs. Bank of Louisiana et al.* 386

4. A notary will not be allowed to testify to any thing which contradicts or strengthens his official acts as declared and set forth in his certificate of protest... 386

5. Where a note discounted in bank is not legally protested so as to bind all the endorsers, the bank alone is responsible to the injured party by the neglect of the notary. There is no privity between this party, and the notary, who is the agent of the bank..... *ib.*

6. The notary must find out the domicile of the maker of a note, and make demand *there*, when no place is designated and personal demand cannot be made... *ib.*

7. A notary will not be permitted to alter his record of the protest and notice to endorsers, by interlining and inserting the manner or circumstances of giving notice, which he or his clerk may have omitted..... *Peyroux et al. vs. Davis.* 479

8. Where the defendants put a note into the hands of their notary which had been deposited with them for collection, who failed to make a record of his protest and notice to the endorsers, by which the latter were discharged: *Held*, that the notary and his sureties, and not the bank, are liable.

*Hyde & Goodrich vs. Planters' Bank of Mississippi.* 560

## PARTITION.

1. In an action of partition the omission of some of the defendants to appeal, cannot effect the right of the others to do so..... *Farrar vs. Newport et al.* 346

## PARTNERSHIP.

1. The owners of a steamboat, transporting passengers and carrying merchandise for hire, are commercial partners and may be sued individually, or a portion of them, for a debt due by the boat, without joining all the parties in the action.

*Black vs. Savory et al.* 85

2. After dissolution of the partnership the partners should be sued in the parish or place of their domicile; and only those residing in the same parish, can be joined..... *ib.*

3. While a commercial partnership is in existence, service of citation on one of the members of the firm is good against all of them; but after its dissolution every member, intended to be sued and made a party, must be served with citation separately..... *Gaienné vs. Aikin's Executor et al.* 49

4. The liquidator of a partnership has no authority to stand in judgment for the other members of the firm, unless a special power be given to that effect..... *ib.*

5. So where the partners of a commercial firm were sued after the dissolution of the partnership, and one only was cited who appeared and put in an answer for himself: *Held* that the judgment was null and void as to the other who was not separately cited..... *ib.*

6. Real estate or immovable property although purchased in the name of a firm, becomes the *joint* property of the individuals composing the firm and not partnership property liable first to the partnership debts.

*Bernard, syndic, &c. vs. Dufour.* 596

7. Where real estate is paid for with partnership funds, it creates an individual



indebtedness of the partner to the *firm*, but the partnership does not thereby become the owner; or confer on the creditors of the firm any right or privilege on its proceeds, in preference to individual creditors. . . . . 596

8. The individual share or interest of a partner in real estate will form a fund in the hands of his syndie, liable to the claims of all his creditors without distinction. . . . . *ib.*

9. Partnership creditors are privileged over individual ones, on the partnership effects; but the latter have no such preference over the former on the separate and individual property surrendered by the insolvent member of a firm. . . . . *ib.*

10. The liquidating partner of a firm has no right to dispose of and control the undivided interest of the other partner in real property owned jointly. . . . . *ib.*

### PAYMENT.

1. To prove the extinguishment of the debt, claimed in the suit, such payment must be specially pleaded. . . . . *Landry vs. Baugnon.* 82

2. The plea of payment relates particularly to transactions between plaintiff and defendant, and exclusively to sums paid the latter in discharge or in part payment of the plaintiff's demand. . . . . *Davis vs. Davis's Syndic.* 295

3. Under the plea of the general issue, the defendant has a right to show that the plaintiff has no claim, or a less one than he sets up, or show money legally expended for plaintiff's benefit, education, etc.; and in general every payment may be proved, made to any person, except the plaintiff, which tends to lessen or destroy his demand. . . . . *ib.*

4. Payment made to the payee by the drawee of a bill of exchange which is pledged to him, evidenced by a receipt written over the payee's endorsement, before the bill was due, when it is shown the property of the bill was in another and liable to his creditors, *is bad and will not avail* against the claims of the creditors of the owner. . . . . *Sewall vs. McNeil et al.* 186

### PLEDGE.

1. A seizing creditor can call for the production and inspection of notes and bills given in pledge, notwithstanding the answers of the pledgee that he has them in pledge. The creditor has a right, by inspection, to ascertain whether the pledge was complete by the endorsement of the pledgor. . . . . *Sewall vs. McNeil et al.* 185

2. The pledge of a bill of exchange or promissory note by notarial act, although endorsed by the payee in blank, is not complete and binding as against third persons and creditors without endorsement of the pledgor, if the instrument be negotiable. . . . . *ib.*

3. A subsequent transfer of notes with *notice and delivery*, will hold against a prior pledge and transfer by notarial act, *without actual delivery*, although due notice had been given. . . . . *Winchester vs. Ory's Syndics.* 428

4. The pledge of a claim or note, on another person, must be by notarial act with *actual delivery* of the thing pledged; and if it be a negotiable note it must be endorsed. Without such a transfer and delivery of the rights of third parties are not affected. . . . . *ib.*

PRACTICE.

1. Where the adverse party is notified, by a rule before trial, to show cause why certain depositions shall not be read, and no valid objection is made, it is too late at the trial to have them excluded, although there are glaring defects in them.

*Anderson vs. Dinn.* 168

2. Where the verdict substantially settles all the points in controversy, it will be deemed sufficient, although it may not technically embrace each issue arising out of the pleadings. . . . . *ib.*

3. If the judgment be different from the verdict, it is not a cause for a new trial, or to remand the case. It will be so amended as to conform to the verdict. . . . . *ib.*

4. The petition and prayer for sequestration and for judgment when the note becomes due, may be considered a conservatory measure, and the filing of an amended petition after the note is actually due, with a prayer for judgment, be taken as the inception of the suit. . . . . *Nelson vs. Pool.* 209

5. So a branch of the Union Bank has no legal or corporate existence to enable it to sue or stand in judgment; and although the owner of a negotiable instrument, yet having no capacity to sue, no action can be maintained by it on said instrument.

*Union Bank vs. Dunn et al.* 234

6. Parties are not to be controlled in the order or manner of introducing the different parts of their evidence of their case. . . *Perkins vs. Nettles' Administrator.* 253

7. The plea of payment relates to transactions between plaintiff and defendant: Under the plea of the general issue the defendant may show that the plaintiff has no claim or a less one; or show money paid on his, plaintiff's, account for his maintenance or education, he being a minor; and in general every payment may be proved, made to any person except the plaintiff, which tends to destroy or lessen his demand. . . . . *Davis vs. Davis's Syndic.* 259

8. Where an answer is put in and acted on, it cannot afterwards be objected to or assigned for error, that the clerk omitted to mark it filed.

*Copeland vs. Mickie et al.* 286

9. Although the want of proper parties can, in general, only be taken advantage of by plea or exception; yet if the plaintiff singled out a part of those who were parties and took judgment against them, while as to others the cause was continued it may be assigned as error apparent on the face of the record.

*Reynolds, Byrne & Co. vs. Feliciana Steam-boat Company.* 307

10. It is not required to be proved that the laws of Mississippi, where a note is made payable, need not be presented for payment at the place designated therein, in order to maintain an action against the maker, when the want of demand is not pleaded. . . . . *Wetmore & Co. vs. Merrifield.* 513

11. Proof of the defendant's signature as acceptor, and also of the payee of the bill, is required before a recovery can be had, when the general issue is pleaded and the signatures of the acceptors specially denied. . . . . *Fryer et al vs. Darcy.* 527

12. A party should not be permitted to take a second rule, even for a new cause, after having unsuccessfully attempted to sustain the first one for the same purpose, unless the new cause should have arisen afterwards.

*Buel vs. New York Steamer et al.* 541

13. A witness may be introduced and examined by either party after the evidence is closed, when offered before commencing the argument..... 541
14. An exception to the charge of the court must be taken when the judge shall have finished his charge; before the jury retire and in their presence..... *ib.*
15. There is no necessity of stating in full the names intended by the letters placed between the names and sur-names of the plaintiff's in the petition.  
*Shipman & Ayres vs. Haynes.* 503
16. Where a commission is addressed to W. E., notary public, in another State, he is thereby authorized to administer an oath to the party interrogated, whether his official station as notary authorized him or not..... *ib.*

### PREScription.

1. Where it is established that the defendant has been judicially notified of the title or claim which is the foundation of the demand for the whole of the property or debt, so as to acquire a sufficient knowledge of the rights, sought to be enforced against him, there results a legal interruption of prescription in favor of those to whom such rights belong..... *Flower et al. vs. O'Connor.* 213
2. So where suit is brought on a promissory note by D. F., as surviving partner of the commercial firm of D. B. F. & Co., who was non-suited, yet it being for the whole amount of the claim or note, caused such an interruption in favor of the plaintiff's firm, as to destroy the defendant's plea of prescription..... *ib.*
3. Although one cannot prescribe against his own title, he can prescribe beyond it; and claim more land than his title calls for, if he has had uninterrupted possession of the surplus a sufficient length of time.  
*Zeringue vs. Harang's administrator.* 349
4. The prescription of actions against sheriffs for misfeasance and illegal acts of office, is extended by the act of 28th February, 1837, from one to two years, from the day of the commission of the acts complained of.  
*Stinson, curator, &c. vs. Buisson.* 567
5. The plea of prescription and of a discharge under a protestation that the debt was never due, do not amount to a waiver of the plea of the general issue.  
*L. & T. F. Shewell vs. Raguet.* 457
6. In an action of debt on an account, the pleas of prescription and discharge under the insolvent laws of another State, do not amount to a waiver of the plea of the general issue..... *Thomas Shewell vs. Raguet.* 459

### PRINCIPAL AND AGENT.

1. Between principal and agent, where ever the former can identify his property, or its proceeds, in the hands of his factor or agent, he is entitled to recover it..... *Stetson, Avery & Co. vs. Gurney; Robertson intervenor.* 162
2. But money, the mere representative of value, cannot be identified and reclaimed as goods or property. When money is advanced to an agent to be employed in the purchase of cotton, &c., the latter becomes indebted for that amount and the relation of debtor and creditor exists between them..... *ib.*

3. So where R. advanced money to G. a broker, to buy cotton, and the latter deposited the money in bank to his own credit which was in part seized by one of his judgment creditors: *Held*, that it was rightfully seized. Money deposited in bank cannot be identified and is in fact a debt due the depositor by the bank... 162

4. An agent interested only to the amount of his commissions is a competent witness for his principal; but when his interest is distinct and not growing out of his agency he is incompetent. .... *ib.*

5. An agent who sells goods or property of his principal and takes a note to his own order, which is protested at maturity and he uses no legal means or diligence to enforce or secure payment, he makes the debt his own and is liable to his principal for its amount. .... *Kinney vs. Crane.* 417

6. A bank employing their notary to protest a note deposited with them for collection, is not liable for the official misconduct or failure of the notary to give notice to the endorers by which they are discharged.

*Hyde & Goodrich vs. Planters' Bank of Mississippi.* 560

7. So where the defendant gave a note, deposited with them for collection to their notary, who failed to make a record of his protest and notice to the endorser by which the latter was discharged: *Held*, that the notary and his sureties, and not the bank, are liable. .... *ib.*

8. Where the notary states he demanded payment of F. E., the attorney in fact of the drawer, the notary's statement is no evidence of the agency. It should be proved on the trial like any other fact. .... *Fortier vs. Field.* 587

## PROHIBITION.

1. A writ of prohibition will not be granted, prohibiting the Judge *a quo* from proceeding to try a cause on the merits, while an appeal is pending from a judgment dissolving an injunction on a matter purely incidental to the main action.

*State vs. Judge of the first District Court.* 511

## RATIFICATION.

1. The acts of a party from which the ratification of a contract is sought to be deduced, must evince clearly and unequivocally his *intention to ratify*. If his acts be in any manner accounted for without a ratification of the contract necessarily resulting from them, they do not amount to an approval or confirmation.

*Copeland vs. Mickie et al.* 286

2. No tacit approval or ratification of an act or contract is recognized except that which results from the fact of suffering time to elapse within which the rescissory action may be exercised. .... *ib.*

3. So in a contract of sale procured by threats and violence and where the party received the money, partly through necessity and from the belief that it was incumbent on him to use diligence to collect the draft in which he was to be paid, but he soon after tendered the money and demanded a rescission of the sale: *Held*, that in thus receiving the money, there was no *intention* manifested to ratify the sale. .... *ib.*

4. Where the purchaser of a slave at probate sale, remains in the undisturbed



possession and has paid part of the price, it will be considered a ratification of the sale and he cannot resist payment of the balance.

*Stephenson's administrator vs. Addison et al.* 454

## RES JUDICATA.

1. A plea which states that a final settlement had taken place of all accounts and transactions between the parties at a certain period, is an admission which precludes the party making this plea, from claiming any balance apparently due before that period. .... *Erwin's heirs & assigns vs. Bissell et al.* 92
2. The judgment forms the authority of the thing adjudged upon all matters and demands set up in the pleadings. .... *ib.*
3. A judgment not rendered between the same parties cannot form the plea of *res judicata*. .... *Randall vs. Bank of Louisiana.* 273

## SALE.

1. Where the thing sold turns out to be so defective that had the defects been made known to the purchaser, he would not have bought, the sale will be rescinded. .... *Melançon vs. Robichaux.* 97
2. Even if the warranty is excluded, the seller is bound to disclose the defects or vices of the thing sold, to the buyer. .... *ib.*
3. Where the evidence shows the conveyance of a house and lot was made in fraud of creditors by the debtor, to a third person for an alleged price, the sale will be avoided. .... *Lopez's Heirs vs. Bergel, f. w. c.* 257
4. Where the vendor "sells all his right to the land back of that on which he resides," it will be considered a sale at the purchaser's risk, which implies no warranty and the question of eviction and probable disturbance have no application to it. .... *Laville vs. Rightor et al.* 303
5. Where the price is not paid, the vendor may obtain a dissolution or rescission of the sale; and the court will fix a day, on which if the price is not paid, the sale will be rescinded. .... *ib.*
6. When the thing sold remains in the corporeal possession of the seller, who is suffered to act as owner to the injury of a third person, the rule that the delivery of immovables always accompanies the public act which transfers the property, ceases to be applicable. .... *Thibodeaux vs. Thomasson et al.* 353
7. A sale of plaintiff's *pretensions* to a tract of land, the title to which was in the United States, but both parties being ignorant that it had been comprized within the "Live Oak reservation," and was not liable to entry, is an error in the motive sufficient to rescind the sale. .... *Theriot vs. Chaudoir et al.* 445
8. Where the price is stipulated in a sale is large, and it is even doubtful as to the error in the motive, the court will incline in favor of a party striving to avoid loss against one seeking to obtain gain. .... *ib.*
9. A promise to sell when the thing sold and the price of it are agreed on, is so far a sale, that it gives to either party a right to claim, *rectâ via*, the delivery of the thing or payment of the price; but the promise does not place the thing at

the risk of the promisee, or transfer to him the ownership or dominion of it.

*McDonald vs. Aubert.* 448

10. Where the purchaser of a slave, at probate sale, remains in the undisturbed possession and has paid part of the price it will be considered a ratification of the sale, and he cannot resist payment of the balance.

*Stephenson's Administrator vs. Addison et al.* 454

11. If a sale becomes valid by ratification of the purchaser, and the seller seeks payment, there can be no danger of eviction when no third party makes any claim. . . . . *ib.*

12. An appraisement of the identical property claimed, together with a receipt on the back of the execution, by plaintiff, that she received the amount of sale of the property seized by becoming the purchaser, is insufficient evidence of title to it, when the sheriff's deed is not produced, and there is no other evidence of an adjudication. . . . . *Bourgeois vs. Bourgeois et al.* 494

### SHERIFF.

1. So a sheriff suffering an escape of a debtor, arrested on meane process, his responsibility is limited to the loss actually sustained by the plaintiff; and the actual loss must be ascertained before judgment.

*Stinson, Curator, &c. vs. Buisson.* 567

2. It is not certain that an ex-sheriff could recover on a bond taken payable to himself as sheriff, after he is functus officio. . . . . *Buisson vs. Hyde et al.* 19

3. A sheriff having ceased to be a public officer, he has no right any longer to keep or collect any bonds given to him as sheriff, in execution of any order of court. . . . . *Same case, on a re-hearing.* 23

4. The sheriff who sequesters property is bound to use the same diligence to preserve it as he would do for himself; and to use such care as will secure it for the benefit of the party to whom it is ultimately adjudged.

*Parish vs. Hozey, Sheriff.* 578

5. So where a bill of exchange is sequestered, the sheriff is bound to have it presented for payment at maturity, and if not paid, to have it protested, and due notice given to all the parties to it, otherwise he will be liable for the amount. . . . . *ib.*

### SHERIFF'S SALE.

1. The judgment under which a sheriff's sale was made, must be produced as the basis on which execution issued, and which is of itself *prima facie* evidence of the regularity of the previous proceedings. . . . . *Childress vs. Allin et al.* 37

2. So a sheriff's deed which appears on its face to have been officially and legally made, should not be rejected when offered as evidence in support of the plaintiff's title, on the ground that the judgment on which execution issued, was defective and not legally rendered. . . . . *ib.*

3. The writ of execution and sheriff's return thereon, in ordinary cases are absolutely necessary to support a sheriff's sale; but when it is shown that they, together with the other papers of the suit, have been lost or destroyed, a copy of the naked judgment from the minutes of the court will suffice. . . . . *ib.*





4. Where the judgment creditor purchases in the property of his debtor at sheriff's sale and reconveys it to him on certain terms and conditions; from the moment of the adjudication it is an extinguishment of the judgment for the price bid on the property; and no new execution can issue on the judgment without notice, and contradictorily with the judgment creditor. . . . *Zacharie vs. Winter*. 76
5. A subsequent mortgagee of property sold at sheriff's sale who made a private arrangement with the purchaser, who was the seizing creditor, was an incompetent appraiser. A fraudulent appraisal is, as if none had been made. *ib.*
6. A sheriff's sale of immoveable property must be made at the seat of justice for the parish where the seizure is made; unless in the country and the debtor requires it to be made on the plantation, which fact must be stated in the advertisement. . . . *ib.*

### SHERIFF'S BONDS.

1. It is not certain that an ex-sheriff could recover on a bond taken payable to himself as sheriff, after he is *functus officio*. . . . *Buisson vs. Hyde et al.* 19
2. A sheriff's bond, taken under an order of court, payable to himself as sheriff, for the price of property sold, gives him no right to the bond in his former capacity of sheriff, when he has resigned, as the legal agent of the party is interested, and less so in his individual capacity. . . . *Same case; on a re-hearing.* 22
3. So a sheriff having ceased to be a public officer, has no longer any right to keep, or collect any bond given to him as sheriff, in execution of any order of court. . . . *ib.*
4. Where a bond is taken to the sheriff in his official capacity, although it be not payable to his successors in office, yet on his resignation, his successor ought to be the judicial depository of the bond. . . . *ib.*

### SIMULATION.

1. A simulation is not necessarily a fraud. It is only when injury to third persons is intended that it becomes fraudulent.

*Gravier's curator vs. Carraby's executor.* 118

### SLAVES.

- 1: Where the evidence shows that a slave, mules, and cart were run over and destroyed through the fault and folly of the slave in driving across the rail road of the defendants when the engine was approaching and near, the owner cannot recover any thing for their loss. . . . *Lesseps vs. Pontchartrain Rail Road Company.* 361

### STEAM BOATS AND OWNERS.

1. The captain of a steamboat is answerable for the damage occasioned by the engineer in bringing a slave on board, or acts of those employed by him, even when these acts are done contrary to his instructions and without his knowledge.

*Buel vs. New York Steamer et al.* 541

2. To make the captain of a steamboat liable for a slave lost by going on board,

the plaintiff must in all cases prove he could have prevented the act complained of, but did not. .... 541

3. Where it is shown a slave was allowed to go on board defendants' steamboat and be carried out of the State, so that he was lost, he is liable for his value and all costs and damages, and cannot be excused on the pretext that the slave passed for free. .... ib.

### SUCCESSION.

1. Until a succession, accepted with the benefit of inventory, has been administered, it is under the control and supervision of the Court of Probates; and is not liable to be sold at the instance and recommendation of a family meeting in favor of the minor heirs. .... *State vs. Judge of Probates of St. John Baptiste.* 500

2. After its liquidation, should there remain any property when the debts are paid, the beneficiary heirs may be put in possession. Any sale that may be necessary must be ordered by the Judge of the parish of the minor's domicile with the advice of a family meeting. .... ib.

### THIRD PERSONS.

1. Third persons cannot contest the validity of a sale and a transfer of a judgment between others, as being simulated. It is only the heir or creditor of the owner, whose right or interest may have been affected or prejudiced by the transfer, who can complain. .... *Randall vs. Bank of Louisiana.* 273

### VENDOR AND VENDEE.

1. Where the vendor "sells all his right to the land back of that on which he resides," it will be considered as a sale at the purchasers risk, which implies no warranty, and the questions of eviction and probable disturbance have no application to it. .... *Laville vs. Rightor et al.* 303

2. Where the price is not paid the vendor may obtain the rescission of the sale; and the court will fix a day on which, if the price is not paid the sale will be rescinded. .... ib.

3. The defendant contracted under a penalty to buy the plaintiffs plantation for a certain sum, payable in a year, but to be discharged on the vendor's obtaining a loan from Bank on mortgage of the premises by the vendee's taking his place: *Held*, that as soon as the loan was obtained the purchaser is liable to the penalty when he failed to take his vendor's place as debtor to the bank.

*Nettles vs. Scott.* 336

### VERDICT—SEE JURY.

### WALL.

1. A co-proprietor is at liberty to increase the height of a wall, hold in common, at his own expense, and if the common wall is unable to support the additional weight of the new one, he is bound to rebuild it anew, at his expense, taking the

	PAGE
additional thickness from his own property.....	<i>Pierce vs. Musson.</i> 389
2. But an adjacent proprietor has no right to cut away part of the foundation of his neighbor's wall or house, or to cause the projections of his wall to rest on that of his neighbor; if it cause injury or damage, and for which he is responsible if he exercises his right without due precaution.....	ib.
3. The appointment of experts is a mere precaution, and will not have the effect of discharging the neighbor from the obligation of repairing the injury caused by the new work.....	ib.
4. So where the defendant cut away part of the foundation of plaintiff's wall, and erected his new one thereon, causing damage by cracking and breaking plaintiff's wall, he is liable for all the damage occasioned thereby.....	ib.
5. It is no excuse against the payment of these damages, that the plaintiff made no opposition or objection to the erection of the defendant's new wall. The latter made his new work at his own risk.....	ib.

## WILLS.

1. The admission of a will to probate and the order given for its execution are only preliminary proceedings, necessary for the administration of the estate, and do not amount to a judgment, binding on those who are not parties to them.

*Robert f. w. c. vs. Allier's agent.* 4

2. Courts of general jurisdiction cannot sustain an action to establish a Will, and decree its execution; and also the recovery of property claimed under it..... ib.
3. Whenever the validity of a Will is attacked and put at issue at the time that its execution is applied for; or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into the possession of the estate under it, *Courts of Probate alone have jurisdiction*..... ib.
4. In an action by an heir at law against the testamentary heir or universal legatee, who is in possession, and sets up the Will as his title to the property, the district courts, or courts of general jurisdiction are the proper tribunals in which such suits must be brought..... ib.
5. In France, proof of the execution or signature to an olographic will is not required to make it executory. In Louisiana it is otherwise..... ib.
6. So where a will, made in a foreign country, has *not been proved*, because the laws of that country did not require it, before ordering it to be executed, it cannot be registered or carried into effect in Louisiana, without being first duly proved before one of our courts of probate..... ib.
7. Foreign wills must be proved in the manner provided by the laws of Louisiana; if it is not shown that they have been duly proved in the country where made. ib.
8. So an olographic will, made in France and deposited in the office of a notary public there, for execution, without proof of the signature, will not be carried into effect in Louisiana, until it be duly proved here in the Court of Probates..... ib.
9. Where a copy of a foreign will is presented to the Judge of Probates in this State, together with authentic evidence of its having been duly approved and ordered to be executed in the country where it was received or made, it is the duty of the Judge to order the registry and execution of the will.

*State vs. Judge of Probates of New Orleans.* 485

10. The registry and execution of a foreign will may be made, when the case requires it, without any appointment of administrator or dative testamentary executor. .... *ib.*

Where one of several executors of a foreign will, duly proved and ordered to be executed, presents himself for letters testamentary under the will here, and the case is a proper one, he should be recognized and authorized to act by the Court of Probates under its control and supervision. .... *ib.*

12. The Judge of Probates is in no case authorized to appoint a dative testamentary executor, until the executor named by the will has had an opportunity to accept or refuse the trust. .... *ib.*

### WITNESS.

1. An agent interested only to the amount of his commissions is a competent witness for his principal; but when his interest is distinct and not growing out of his agency, he is incompetent.

*Stetson, Avery & Co. vs. Gurney; Robertson, intervenor.* 162

2. The parish treasurer is a competent witness for the parish in a suit by the police jury against the sheriff for the parish taxes.

*Police Jury of Iberville vs. Sherburne et al.* 343

3. The cashier of a bank, acting as its agent, is a competent witness to testify in relation to the collection of monies, settlement of its claims and the sums of money due to and received by it. .... *Williams vs. Bank of Louisiana.* 378

4. Affidavits of witnesses sworn to before the clerk not in open court, do not constitute that proof which is required by law. .... *Sandeman vs. Deake & Willard.* 532

5. Clerks of courts have no authority out of the presence of the court to swear witnesses and take down their testimony in a cause. They are only to administer oaths in open court, and out of it in cases of arrest, attachment, provisional seizure, or generally in any conservatory measure required by one of the parties to a suit. .... *ib.*

6. Witnesses must be examined, after issue joined; and give their testimony in open court, or it must be taken under a commission. .... *ib.*

### WORK BY THE JOB.

1. Where it is ascertained that more repairs were required on a steam boat, than were contemplated between the parties and included in their contract, the contractor will be entitled to the value of his extra work at a fair price, without being liable for the delay occasioned thereby, beyond the time fixed by the contract. .... *Varion vs. Bell.* 532

2. The principal or master workman is only entitled to extra pay for his personal attendance when there is no contract fixing the hire and wages of the workmen. .... *ib.*

**WRITS OF FI. FA. AND CA. SA.—See Bail and Bail Bond;**  
also Imprisonment for Debt.